

Journal of Indian
Law Review

1875 - 80

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Cause Court powers was essentially different from the case of a Small Cause Court Judge invested with the powers of a Subordinate Judge. The only difference is that the grant of the powers of a Subordinate Judge to a Small Cause Court Judge gives him a larger jurisdiction than he possessed as Small Cause Court Judge; whereas the investiture of a Munsif with Small Cause Court powers only gives him a peculiar kind of jurisdiction in some classes of causes which he had before jurisdiction to try. The difference does not in the least degree [96] affect what is the matter in question, viz., the extent of the duty of the Clerk of the Court, and of the Nazir, and of the liability of their sureties.

The third issue is, therefore, decided in the plaintiff's favour.

Our decision on the second issue relieves us from the obligation of deciding the fourth; but we have no hesitation in expressing our opinion that, had the Small Cause Court Judge, at the date of the execution of the bond in suit, not been invested with the powers of a Subordinate Judge, the Clerk of his Court would, nevertheless, have been bound to receive, take charge and keep account of any moneys paid or realized under decrees passed by any of his successors in office invested with such powers, and that the Clerk's surety would have been liable for his client's misappropriation of any of those moneys. This, indeed, follows from what we have already said in disposing of the third issue. The Clerk's duty is to take charge of all moneys paid into the Small Cause Court, and this duty remains the same whether the Judge of the Small Cause Court only exercise his ordinary jurisdiction, or be invested with additional powers. The grant and exercise of such powers is an accident attached by the law to the office of a Small Cause Court Judge; and the Clerk of his Court is as much bound to perform the accidental as the ordinary duties of his appointment, and the surety's pecuniary liability is co-ordinate with that of the Clerk. The defendant would not, therefore, have been able to repudiate his liability in respect of moneys paid to, or realized by, the Clerk in respect of decrees passed by the recent Judges, of the Small Cause Court at Allahabad in the exercise of the powers vested in them of a Subordinate Judge, even had it appeared that, at the time when he executed the bond, Mr. Tyrrell had not been invested, or not legally invested, with those powers. The circumstance that, at that time, and for some years before, the Judge of the Small Cause Court has exercised those powers, and the Clerk of his Court had, as a part of his duty, received all moneys paid or realized under decrees passed in the exercise thereof, precludes the defendant from pleading with plausibility, and us from believing, that he executed the bond in ignorance of the Clerk's duty and liability, and under the impression that he was only undertaking a risk in respect of moneys paid or realized under decrees passed by the Small Cause Court Judge [97] in the exercise of his ordinary jurisdiction. The description of Mr. Church in the bond as the Clerk of the Small Cause Court and of Mr. Tyrrell as the Judge of that Court is strictly accurate, and not at all incomplete by reason of the absence of any mention of the powers of a Subordinate Judge vested in the Judge of the Small Cause Court. The plea that in reference to that description, the defendant's liability was limited to moneys paid to, or realized by Mr. Church under decrees passed by the Judge in the exercise of his ordinary jurisdiction is not sustainable.

Decree for plaintiff with costs.

[1. ALL. 97]

BEFORE A FULL BENCH.

The 5th August, 1875.

PRESENT:

SIR ROBERT STUART, K.T., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, MR. JUSTICE SPANKIE, AND MR. JUSTICE OLDFIELD.

Jiwani Singh..... Judgment-debtor

versus

Sarnam Singh..... Decree-holder.^{*}

Execution of Decree—Limitation Act IX of 1871, s. 15.

Held (STUART, C.J., dissenting), that applications for execution of decrees are not "suits" within the meaning of s. 15, Act IX of 1871.†

ON appeal by the judgment-debtor against the order of the first Court disallowing his objection that the execution of the decree was barred by limitation, the question arose whether, in computing the period of limitation, the time during which the decree-holder was endeavouring to obtain execution in a Court without jurisdiction should be excluded or not under s. 15, Act IX of 1871. The lower Appellate Court held that the provisions of the section applied to applications for the execution of decrees, relying on a ruling of the High Court, dated the 1st May 1884, in which STUART, C.J., and OLDFIELD, J., ruled that the provisions of s. 14, § Act XIV of 1859, were so applicable, expressing their [98] concurrence in what the learned Judges considered a ruling to that effect in *Hari Chunder Roy Chowdhury v. Shoorodhunee Debia* (9 W. R. 402).

* Miscellaneous Special Appeal No. 79 of 1874, from an order of the Judge of Gazipur, dated the 3rd July 1874, affirming an order of the Subordinate Judge, dated the 17th January 1874.

† So held by Jackson (McDonell, J.J., dissenting), in *Banee Kant Ghose v. Haran Kista Ghose*, 24 W. R. 405—contra by Birch and McDonell, J.J., in *Rajah Promotho Nath Roy v. Watson & Co.*, 24 W. R. 333.

‡ [See. 15 :—In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence

Exclusion of time of another suit, whether in a Court of First Instance or in a Court suing *bona fide* in Court of Appeal, against the same defendant or some person whom he without jurisdiction.

represents, shall be excluded, where the last mentioned suit is founded upon the same right to sue, and is instituted in good faith in a Court which from defect of jurisdiction, or other cause of a like nature, is unable to try it.

Explanation 1 :—In excluding the time during which a former suit was pending, the day on which that suit was instituted and the day on which the proceedings therein ended, shall both be counted.

Explanation 2 : A plaintiff resisting an appeal presented on the ground of want of jurisdiction shall be deemed to be prosecuting a suit within the meaning of this section.]

§ [See. 14 :—In computing any period of limitation prescribed by this Act, the time during

Computation of period of limitation in case of suit prosecuted *bona fide*, but in wrong Court.

which, on appeal, shall have been annulled for any such cause, including the time during which such appeal, if any has been pending, shall be excluded from such computation.]

On special appeal to the High Court, the judgment-debtor impugned the decision of the lower Appellate Court, citing a ruling of the High Court, dated the 17th June 1872. In that ruling PEARSON and TURNER, JJ., were of opinion that *Hurro Chunder Roy Chowdhry v. Shoorodhonee Debia* only went to show that deductions might be made in calculating the limitation prescribed by Act XIV of 1859 for suits, and did not determine that the provisions of s. 14 of that Act applied so as to enlarge the time within which applications might be made for execution. The learned Judges held that the section applied only to original suits and not to applications for the execution of decrees, referring to *Khetturnath Dey v. Gossain Dass Dey* (4 W. W. Misc. 18), in which case a similar view was taken by the Calcutta High Court, and to *Darsaiah Chinniah Chenchu v. Godain Chetty Veeriah* (4 Mad. Jur. 101), in which case the Madras High Court held that the provisions of s. 13 could not be applied to the execution of decrees.

The Court (PEARSON and OLDFIELD, JJ.) referred to the Full Bench the question which of the two rulings of the High Court was the right one.

Mr. Leach and Babu Drarka Nath Mukarji for the Appellant.

Mr. Conlan, Pandit Ajudhia Nath, and Munshi Hanuman Parshad for the Respondent.

The following **Opinions** were delivered by the Full Bench :- -

Stuart, C.J.—I was a party to the decision of 1st May 1874, and to the opinion I then expressed I advisedly adhere. With regard to the present reference, I cannot say that an application for the execution of a decree is not a suit within the meaning of s. 15, Act IX of 1871. I think it is. It has been repeatedly held in England that the word "suit" does include any proceeding instituted for the purpose of obtaining any beneficial order or relief, and that a petition presented for this purpose was a suit; and I observe it has been used in that sense in the practice of the American Courts. In Kent's Commentaries on the American Law, vol. i, [99] p. 314, note (d), 11th ed. published in 1867, two cases are referred to in which it was decided that a *mandamus* is a "suit, for it is a litigation in a Court of Justice seeking a decision," and in the Calcutta case referred to by the Officiating Judge of Ghazipur (*Hurro Chunder Roy Chowdhry v. Shoorodhonee Debia*, 9 W. R. 402), the following passage occurs in the judgment of Sir Barnes Peacock, Chief Justice:—"The word 'suit' does not necessarily mean an action, nor do the words 'cause of action' and 'defendant' necessarily mean cause upon which an action has been brought, or a person against whom an action has been brought, in the ordinary restricted sense of the words. Any proceeding in a Court of Justice to enforce a demand is a suit; the person who applies to the Court is a suitor for relief; the person who defends himself against the enforcement of the relief sought is a defendant; and the claim if recoverable, is a cause of action." The meaning of this, I think, is that the word "suit," as used in s. 15 of the Limitation Act, does not mean a suit or action in an exclusively technical sense, but simply and generally any proceeding intended and adapted to the recovery or vindication of any right or demand or material advantage. Such was undoubtedly the meaning put upon the word "suit" by lawyers before Act IX of 1871 was passed; and the question therefore is whether there is anything in that Act to change the construction which up to that time had been put upon the term. I do not see that there is, nor do I understand that the mere mention of applications in the Act distinct from suits can have the effect of limiting the general relief of benefit that by s. 15 is intended. I would, therefore, answer this reference by saying that the above ruling is right, and that an application for the execution of a decree is a suit within the meaning of s. 15, Act IX of 1871. •

Pearson, J.—I was myself a party to the decision of the 17th June 1872, and on reconsideration adhere without hesitation or doubt to the opinion therein expressed. Throughout the Act IX of 1871 the distinction between suits and applications is never forgotten; they are never confounded together. The particular section (15) which we have to consider enacts that, “in computing the period of limitation prescribed for any *suit*, the time during [100] which the plaintiff has been prosecuting with due diligence another *suit*, whether in a Court of First Instance or in a Court of Appeal, against the same defendant or some person whom he represents, shall be excluded, where the last-mentioned suit is founded on the same right to sue, and is instituted in good faith in a Court which, from defect of jurisdiction or other cause of like nature, is unable to try it.” The cases in which a plaintiff may honestly make a mistake as to the Court in which his suit should be brought are not unfrequent; and therefore the provision contained in s. 15 is quite suitable to a suit. But the case in which a decree-holder could *bona fide* attempt to execute his decree in a wrong Court must be very peculiar and exceptional; and a general provision of law is therefore not required to meet a case which can hardly ever occur. It is remarkable that ss. 16, 17, * 18, † 19, ‡ and 20§ are only applicable to original suits;

Exclusion of time during
which judgment-debtor
sues to set aside execution
sale.

*[Sec. 17 :—In computing the period of limitation presented for a suit for possession by a purchaser at a sale in execution of a decree, the time during which the judgment-debtor has been prosecuting a suit to set aside the sale shall be excluded.]

†[Sec. 18 :—When a person who would, if he were willing, have a right to sue, dies before the right accrues, the period of limitation shall be computed from the time when there right to sue accrues.

Effect of death before
right to sue accrues.

When a person against whom, if he were living, a right to sue would have accrued, dies before the right accrues, the period of limitation shall be computed from the time when there is a representative when the plaintiff may sue.

Nothing in the former part of this section applies to suits for the possession of land or of an hereditary office.]

‡[Sec. 19 :—When any person having a right to sue has, by means of fraud, been kept
from the knowledge of such right or of the title on which it is founded,

and where any document necessary to establish such right has been fraudulently concealed,
the time limited for commencing a suit,
(a) against the person guilty of the fraud or accessory thereto, or,
(b) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production.]

§[Sec. 20 :—(a) No promise or acknowledgment in respect of a debt or legacy shall take
the case out of the operation of this Act, unless such promise or acknowledgment is contained in some writing signed, before the expiration of the prescribed period, by the party to be charged therewith or by his agent generally or specially authorized in this behalf.

(b) When such writing exists, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the promise or acknowledgment was signed.

(c) When the writing containing the promise or acknowledgment is undated, oral evidence may be given of the time when it was signed. But when it is alleged to have been destroyed or lost, oral evidence of its contents shall not be received.

Explanation 1 :—For the purposes of this section, promise or acknowledgment may be sufficient, though it omits to specify the exact amount of the debt or legacy, or avers that the time for payment or delivery has not yet come, or is accompanied by a refusal to pay or deliver, or is coupled with a claim to a set off or is addressed to any person other than the creditor or legatee; but it must amount to an express undertaking to pay or deliver the debt or legacy or to an unqualified admission of the liability as subsisting.

Explanation 2 :—Nothing in this section renders one of several partners or executors chargeable by reason only of a written promise or acknowledgment signed by another of them.] .

and it may reasonably be assumed that, if s. 15 had been intended to apply to applications for execution of decree as well as to suits, the intention would have been expressed and made known in an explanation like *explanation 2*, which intimates that "a plaintiff resisting an appeal presented on the ground of want of jurisdiction shall be deemed to be prosecuting a suit within the meaning of this section." In the absence of any such explanation, regard being also had to the distinction which is observed throughout the Act between suits and applications, I conceive that s. 15 must be held to apply to suits as distinguished from applications, and that the word suit as distinguished from applications, and that the word suit therein used does not include an application for the execution of a decree.

Turner, J.—I concur in the opinion delivered by Mr. Justice PEARSON, and place the same construction on the 15th section of Act IX of 1871 as I have heretofore placed on the similar section, Act XIV of 1859.

Spankie, J.—I accept Mr. Justice PEARSON'S opinion as conclusive on the point referred to us.

Oldfield, J.—Looking to the terms of s. 15 Act IX of 1871, I do not think the provisions of that section were intended to apply to applications for execution of decrees, but only to suits in their strict sense.

[101] It will be observed that throughout Act IX of 1871, a distinction is made between suits, appeals and applications. It is to be found in the preamble of the Act, and again notably in s. 4, and in the second schedule, which prescribes the period of limitation applicable to three divisions of subjects, suits, appeals and applications, amongst the last of which are found enumerated applications for executions of decrees.

I think Act IX of 1871 clears up what was obscure in Act XIV of 1859, under which the word suit may have been used in a wide sense, so as to include an application to enforce execution of a decree.

The title of Act XIV of 1859 is an "Act to provide for the limitation of suits," and the preamble is "whereas it is expedient to amend and consolidate the laws relating to limitation of suits, it is enacted as follows:" but the title and preamble of Act IX of 1871 differ materially. Act IX of 1871 being "An Act for the limitation of suits and for other purposes," and it recites, "whereas it is expedient to consolidate and amend the law relating to the limitation of suits, appeals and certain applications to Courts, etc." Whereas in Act IX of 1871, suits and applications are separately treated, the word suit cannot, I apprehend, be held to mean and include an application.

NOTES.

[STATUTORY CHANGE—

Both the Limitation Act of 1877 and of 1908 provide for all **applications** as well as suits by Sec. 14 (2). For the view that an execution application is not a suit, see also 2 Cal. 336; 22 Mad. 256; 79 P. R. 1877. See also (1878) 2 Mad. 1.]

[1 All. 101]

BEFORE A FULL BENCH.

The 10th August, 1875.

PRESENT :

MR. JUSTICE TURNER, OFFICIATING CHIEF JUSTICE,
 MR. JUSTICE PEARSON, MR. JUSTICE SPANKIE, AND
 MR. JUSTICE OLDFIELD.

Tej Ram and others.....Auction-purchasers
versus
 Harsukh.....Judgment-debtor.

*Stat. 24 and 25 Vic., c. 104, s. 15—Powers of superintendence of High Court—
 Revision of judicial proceedings—Jurisdiction.*

The High Court is not competent, in the exercise of the powers of superintendence over the Courts subordinate to it conferred on it by s. 15 of 24 and 25 Vic., c. 104, to interfere with the order of a court subordinate to it on the ground that such order has proceeded on an error of law or an error of fact.

Where, therefore, on appeal by the judgment-debtor against an order confirming a sale of immoveable property in the execution of a decree, the lower Court set aside the sale, on a ground not provided by law, and the [102] auction-purchasers applied under the above-mentioned section to the High Court to cancel the lower Court's order, the High Court refused to interfere.*

THIS was an application to the High Court by the purchasers at a sale of immoveable property in the execution of a decree for the cancellation, as being contrary to law, of the order of the lower Court setting aside the sale. The application purported to be made under s. 15 of 24 and 25 Vic., c. 104, the auction-purchasers contending that the High Court was empowered to interfere under that section. The question of jurisdiction raised by this contention was referred by the Division Bench (STUART, C.J., and OLDFIELD, J.) before which the application came for hearing to the Full Bench.

It appeared that, on appeal by the judgment-debtor from the order of the first Court confirming the sale, the lower Court of appeal had set aside the sale on the ground that no notice of the application for the execution of the decree had been served on the representative of the original party to the suit against whom execution was sought in accordance with the provisions of s. 216, Act VIII of 1859.

*Compare *In the matter of Durga Charan Sircar*, 2 B. L. R. A. C. 165, and see also *In the matter of Khowaz Ram Bus Singh*, 23 W. R. 402, in which the Calcutta High Court similarly refused to interfere with an order of the Lower Appellate Court upholding a sale.

†Sec. 216 :—If an interval of more than one year shall have elapsed between the date of the decree and the application for its execution, or if the enforcement of the decree be applied for against the heir or representative of an original party to the suit, the Court shall issue a notice to the party against whom execution may be applied for requiring him to show cause, within a limited period to be fixed by the Court, why the decree should not be executed against him.

Provided that no such notice shall be necessary in consequence of an interval of more than one year having elapsed between the date of the decree and the application for execution, if the application be made within one year from the date of the last order passed on any previous

application for execution ; and provided further that no such notice shall be necessary in consequence of the application being against an heir or representative if upon a previous application for execution against the same person, the Court shall have ordered execution to issue against him.]

Mr. Ross (the Junior Government Pleader) Babu *Dwarka Nath Banarji*, Pandit *Ajudhia Nath*, and Babu *Oprokash Chander* for the Auction-purchasers.

Mr. Conlan and Pandit *Bishambhar Nath* for the Judgment-debtor.

The Junior Government Pleader.—This application is made with reference to *R. V. Koshti v. Narayan Dhulappa* (3 Bom. H. C. R. A. C. J. 110). If your Lordships refuse to interfere in cases like the present much mischief will ensue. The lower Court might as well have set aside the sale on the ground that it was opposed to Scotch law as on the ground it has set it aside. Your Lordships can interfere under s. 15 of the High Court's Act. The first part of the section gives the High Court the power of "superintendence" as distinct from the power it gives it to "call for returns."

Mr. Conlan.—The High Court cannot interfere; *DaCosta v. Hall* (1 R. C. and C. R., Civil Rulings 165 : s.c., 5 W. R. Misc. 25) is an authority exactly in point.

[103] The Opinion of the Full Bench was as follows:—

It is not contended that an appeal lies to this Court from the order of the Judge, or that under the Code of Civil Procedure this Court has any power of interference. It is argued that the Court is authorized to exercise jurisdiction in the matter in virtue of the provisions of 24 and 25 Vic., c. 104, s. 15. These provisions have frequently been urged as justifying the interference of this Court with orders of a Subordinate Court, on the grounds that the orders of the Subordinate Court has proceeded on an error of fact or law, and that no further appeal is given by the Code, and so far as we are aware the Court has uniformly declined jurisdiction.

The provisions of s. 9 of the Statute above-mentioned declare that High Courts established under the Act shall have and exercise all such civil, etc., jurisdiction, etc., and all such powers and authority for, and in relation to, the administration of justice, etc., as Her Majesty may by Letters Patent grant and direct, and that save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the Act at the time of the abolition of such last-mentioned Court.

By the Letters Patent of this Court Her Majesty was pleased to confer on it extraordinary original civil jurisdiction and appellate civil jurisdiction, but she conferred on it no powers of revision in civil suits or matters arising thereout. In these matters the Court has no other power or authority than that enjoyed by the Sudder Dewany Adawlut of these Provinces at the time of its abolition unless such power is derived from the 15th Section of the Statute. The Sudder Dewany Adawlut certainly had no power to exercise judicial functions in any case in which its right of interference was not declared by the law of India, and no provision of any Indian Act is cited as conferring on the Sudder Dewany Adawlut authority to interfere on an application of the nature of that which is now preferred to the Court.

The petitioners then can rely only on the provisions of 24 and 25 Vic., c. 105, s. 15, which declare that the High Courts established under the Act shall have "superintendence" over all Courts [104] which may be subject to its appellate jurisdiction, and consequently it is contended that the term superintendence confers jurisdiction to revise proceedings of the Subordinate Civil Courts.

We cannot allow this contention. Whether we consider the ordinary significance of the term or construe it in connection with the context, it appears to us to confer on the High Court no revisional power, no power to interfere with or set aside the judicial proceedings of a Subordinate Court, but that it confers on the High Court administrative authority and not judicial powers; as we construe the term*, it would be competent to the High Court in the exercise of its power of superintendence to direct a Subordinate Court to do its duty or to abstain from taking action in [105] matters of which it has not cognizance, but the High Court is not competent in the exercise of this authority to interfere and set right the orders of a Subordinate Court on the ground that the order of the Subordinate Court had proceeded on an error of law or an error of fact. It is true that some cases may be found in the reported decisions of other High Courts, in which it appears that Judges have claimed in virtue of the right of superintendence given them by the Statute to exercise larger powers than we believe are conferred by the provisions of that law, but the practice of this Court has accorded with the views expressed by us, and on the construction we put on the Statute we are not at liberty to disturb it.

The record will be returned to the Bench with this expression of our opinion.

NOTES.

[Revisional proceedings cannot be had under the Charter Act to rectify errors in law or fact:—(1885) 9 Bom. 492; (1887) 12 Bom. 617; (1896) 1 C. W. N. 617; (1898) 26 Cal. 76; (1905) 9 C. W. N. 1046—2 C. L. J. 241 F. B.; 38 Cal. 68; (1908) 31 All. 59; (1909) 36 Cal. 994=11 C. L. J. 50. See also 28 Mad. 28; 23 Mad. 68.]

* The statement of the law here given seems on the whole to be in conformity with the view taken in a long series of cases by the Calcutta High Court. That Court has held

(a) that it may interfere, under s. 15 of the High Court's Act, to direct the exercise of a power or jurisdiction disclaimed by the lower Court—see *Gobind Coomar Chowdhry v. Kisto Coomar Chowdhry*, 7 W. R. 520; S.C. 2 Ind. Jur. N.S. 199: *Greesh Chunder Lahooree v. Kasheessuree Debia*, 8 W. R. 26: *Omar Chand Mahata v. Nawab Nazim of Bengal*, 11 W. R. 229: *Collector of Bogra v. Krishna Indra Roy*, 2 B. L. R. A. C. 301: *Petition of Sankar Dobay*, 4 B. L. R. A. C. 65: *Hardayal Mandal v. Tirthanand Thakur*, 4 B. L. R. App. 28: *Khenumkuree Dabi v. Ranee Shurut Soonduree Dabi*, 14 W. R. 9: *Munohur Paul v. J. P. Wise*, 15 W. R. 246: *Petition of Kani Umasundari Dabi*, 5 B. L. R. App. 29: *Petition of Srimati Nassir Jan*, 7 B. L. R. 144: *Haris Chandra Gupta v. Srimati Shashi Mala Gupta*, 6 B. L. R. 721: but see *Petition of Hureelur Mookerjee*, 20 W. R. 202.

(b) that it may interfere to set aside an order made by the lower Court without jurisdiction—see *Joy Ram v. Bulwant Singh*, 5 W. R. Misc. 3: *Bhyrub Chunder Chunder v. Shama Soonderee Debi*, 6 W. R. Act X. Rulings 68: *Judoopnatee Chatterjee v. Chander Kant Bhattacharjee*, 9 W. R. 309: *Petition of Bunkobeharry Ghose*, 11 W. R. 26: *Petition of Maharaja Dhiraj Mahatub Chand Bahadur*, 2 B. L. R. A. C. 217: *Deep Chand v. Gouree and Beharee*, 18 W. R. 98: *Rooknee Roy v. Amritlal Lall*, 14 W. R. 254: *Tarini Charan Mookerjee v. Raja Purna Chunder Roy*, 6 B. L. R. 717: *Mir Habib Sobban v. Mahendra Nath Roy* 2 B. L. R. App. 32: *Amra Nashya v. Gagan Shula*, 2 B. L. R. App. 35: *Haris Chandra Gupta v. Srimati Shashi Mala Gupta*, 6 B. L. R. 721.

(c) that it should not interfere merely on the ground that an order made by a Court having jurisdiction is erroneous—see *Petition of Pearcee Lal Sahoo*, 7 W. R. 180: *Janokee Bullub Sein v. Dukhina Mohun Chowdhry*, 7 W. R. 519: *Showdaminee Dosse v. Manick Ram Chowdhry*, 9 W. R. 386: *Mahomed Busheerullah Chowdhry v. Rankant Chowdhry*, 9 W. R. 394: *Junal Ali v. Shaikh Wahid Ali*, 11 W. R. 97: *Petition of Jodoo Moonee Dossee*, 11 W. R. 494: *Petition of Durga Charan Sirkar*, B. L. R. A. C. 165: *Sreenatty Dossee v. Sreenibash Dey*, 12 W. R. 74: *Asrafannissa Begum v. Syad Inaeet Hossein*, 5 B. L. R. 316: S.C. 13 W. R. 499: *Doorga Soonduree Debi v. Kashee Kant Chuckerbutty*, 14 W. R. 212: *Kalee Hur Doss v. Roodressur Chuckerbutty*, 15 W. R. 90: *Khorshed Ali v. Chowdhry Wahid Ali*, 15 W. R. 170: *Petition of Kasinath Roy Chowdhry*, 7 B. L. R. 146: *Hur Kishore Audhary v. Sudoy Chunder Nundee*, 17 W. R. 80: *Petition of Munroe Singh*, 19 W. R. 306: *Petition of Bagram*, 20 W. R. 10: *Khowaz Ram Bux Singh v. Bishendharee Geer*, 23 W. R. 402: *Ajonmissa Bibi v. Surja Kant Acharji*, 2 B. L. R. 181: see, however, *Maharaja Dhiraj Mahtab Chund Bahadur v. Shagor Kundu*, 6 B. L. R. App. 91: *Petition of Mathuranan Chuckerbutty*, 9 B. L. R. 351.

[1 All. 106]

FULL BENCH.

The 27th August, 1875.

PRESENT :

MR. JUSTICE TURNER, OFFICIATING CHIEF JUSTICE, MR. JUSTICE PEARSON
AND MR. JUSTICE SPANKIE.

Debi Parshad and others.....Defendants

versus

Thakur Dial and others.....Plaintiffs.*

Hindu Law--Undivided Hindu family—Inheritance.

When, in an undivided Hindu family living under the Mitakshara law, a brother dies without leaving issue, but leaving brothers and nephews, the sons of a predeceased brother, the interest in the joint estate of the brother so dying does not pass on his death to his surviving brothers, but on partition the whole estate, including the interest of the brother so dying, is divisible; and the right of representation secures to the sons or grandsons of a deceased brother the share which their father or grandfather would have taken had he survived the period of distribution. [*Madho Singh v. Bindessery Roy* (H. C. R. N.-W. P., 1868, p. 101) overruled.]

DURGA, Bisheshar, Bhairo, and Ram Pargas, were four brothers united in estate. Ram Pargas died leaving sons who were the plaintiffs in this suit. Then Durga and Bhairo died without issue. Finally, Bisheshar died leaving sons, who were the defendants in this suit. [106] The principal issue raised by the suit was whether the plaintiffs were entitled on partition to a moiety of the undivided immoveable estate of the family, or to one-fourth. The first Court held, having regard to the answers to the questions 3 and 4 given in p. 33, Bk. ii., West and Bühler's Digest of Hindu Law Cases, to *Bywastha* No. 2, dated 5th July 1860, *Bywasthas*, S. D. A., N.-W. P., vol. i, part i, and to the opinion of three of the Benares pandits whom it examined on the point, that the plaintiffs were entitled to a moiety of the estate.

The first plea taken by the defendants on appeal by them to the High Court impugned this ruling. With reference to that plea, the Court (PEARSON and SPANKIE, JJ.) referred to the Full Bench the following question, *viz.* :—

"Whether, in a joint family property, two or four brothers dying without issue, their interest passed on their death to their surviving brother exclusively, or whether the sons of a brother who predeceased them are entitled to participate in it?"

The order of reference was accompanied with these remarks :—

Had Bhairo and Durga left separate estates, there can be no doubt that their surviving brother would have succeeded to them in preference to, and to the exclusion of, their nephews; and it is contended that the succession would not be different in a joint undivided family. The contention is supported by the decision of a Bench of this Court, dated the 25th February 1868, in special

* Regular Appeal, No. 33 of 1875, from a decree of the Subordinate Judge of Benares, dated the 18th December 1874.

appeal No. 1779 of 1867, at page 101 of the High Court Reports for 1868. The ruling of the Lower Court in this case is opposed to that decision, but is supported by the answers to the questions 3 and 4 given in page 33, Bk. ii, West and Bühl's Digest, and by the opinions of the Benares pandits examined by the Subordinate Judge. Under the circumstances, we think it expedient to refer the point in question for the consideration of a Full Bench.

Pandit *Jindha Nath* (with him Munshi *Shuk Ram*, for the Appellants, contended that, on the death of a member of an undivided Hindu family, his estate devolved on his heirs. There is nothing in Hindu Law to the contrary, and the pandits examined by the first Court are agreed in so stating. Although, perhaps, it cannot be said that any one member of an undivided Hindu family is the owner of any particular portion of the undivided estate, [107] still his share in it is capable of being defined and expressed. He may be the owner of one-half, or one-third, and so on. If, on his death, his estate devolves on his heirs, then the estate of a brother dying without issue devolves on his surviving brothers and their heirs, according to the rule of succession laid down in *Mitakshara*. If the rule does not apply, there is no other. If the lower Court is right, the death of a member of an undivided Hindu family alters the shares of the surviving members. Thus there would be no inheritance liable to obstruction, according to the definition of the term in *Mitakshara*, but a third kind of inheritance, *viz.*, one liable to alteration. It is true that the Privy Council has ruled in *Katama Natchiar v. The Rajah of Shivagunga* (9 Moore's Ind. App. 539), that the members of an undivided Hindu family are entitled to the benefit of survivorship, but that is as against females. All the members are not entitled to participate in the estate of a deceased member—*Madho Sing v. Bindessery Roy* (H. C. R., N.-W. P., 1868, p. 101). There is no authority to show that the share to which a member of an undivided Hindu family has succeeded lapses on his death into the estate of the common ancestor. It would be impossible to say, where a family consisted of several branches, whether the estate of a deceased member lapsed into the estate of the ancestor of the branch to which he belonged, or into the estate of the common ancestor. A brother in an undivided Hindu family is preferred to a nephew—*Madho Sing v. Bindessery Roy; Brojo Kishore Dassee v. Sreenath Bose* (9 W. R. 463). The status of a reunited Hindu family and an undivided are the same. The rules of succession in a reunited Hindu family support the contention of the Appellants.

Mr. *Mahmood* (with him Munshi *Hanuman Parshad*) for the Respondents.—As to the status of an undivided Hindu family, see Norton's Leading Cases on Inheritance, part i, 173. In *Katama Natchiar v. The Rajah of Shivagunga* the Privy Council held that the property of an undivided Hindu family is subject to the benefit of survivorship. Again, in delivering the judgment of the Privy Council in *Apporier v. Rama Subba Aiyar* (11 Moore's Ind. App. 75), Lord West-[108]bury said no member of an undivided Hindu family could ascertain his share without partition, and that partition produced an effect upon the undivided estate of the family similar to the effect produced by the conversion of joint-tenancy into a tenancy in common. The respondents as coparceners with the appellants in an undivided estate are entitled to share *per capita*. It appears from the judgment in *Sudabart Prasad Shau v. Foolbas Koer* (3 B. L. B. F. B. 31; S.C. 12 W. R. F. B. 1) that the mere fact of birth entitles the sons of brothers united in estate to a right of coparcenehip with their fathers and uncles. There are numerous rulings to the effect that, under *Mitakshara*, the sons have rights of the same degree and quality as the father. In *Bhyro Parshad v. Basisto Narain Pandey* (16 W. R. 31) it was held that, so long as an estate remains undivided, the share of a member of the coparcenary is so uncertain

and undefined that he may be said to have only "a life interest in a common property." The deaths of Bhairo and Durga neither reduced the shares of the respondents, nor increased those of the appellants. The nature of the possession of the parties remained the same, and their shares in the estate are equal shares. But taking another view, even if "the allotment of the shares is according to the fathers"—Mitakshara, ch. i, s. 5, v. 1,—the respondents are entitled to share *per stirpes*, that is, they are entitled to a moiety of the estate in dispute—Norton's Leading Cases, part i, 299; part ii, 461: *Duljeet Sing v. Sheomunook Sing* (1 S. D. Rep., 59 S. C. Morley's Digest, vol. i, 307). They stand in the same relation to the common ancestor as the appellants, and are entitled to the share which their father would have acquired on partition Norton's Leading Cases, part ii, 463. So long as the estate remained undivided the share of Bisheshar could not assume a definite shape and descend to the appellants, or on the death of Durga and Bhairo their shares become definite and descend to Bisheshar.

The Opinion of the Full Bench was as follows:—

To answer the question proposed to us it is necessary to consider the condition of a Hindu family in these Provinces while it remains undivided, and to inquire whether the same rules of succession apply while the members continue joint in estate, when they have separated and effected partition, and when they have re-united. [109] Sir Thomas Strange in the ninth chapter (On Partition, 4th ed., p. 198) of his work on Hindu Law declares that "wherever a plurality of sons exists, the inheritance descends to them as coparceners making together but one heir" * : * : * "the deceased may have left, not only more sons than one, but brothers, as well as a widow or widows, and daughters, together with other dependents; and such sons and brothers may have their wives and children respectively: the whole having constituted in his lifetime, not so many coparceners indeed in the proper sense of the term, but an undivided family. Or supposing him to have been a single man, with collateral relations only, their descendants and connections, all living together in coparcenary, his death makes no difference in this respect among the survivors." If undivided at his death, they still continue so in point of law, however appearances may indicate a different state. So long as they remain joint, they offer one common sacrifice. "The religious duty of unseparated brethren is single," Narada, quoted in Mitakshara, ch. ii, s. 12, v. 3, —until partition takes place.

In respect of property, whatever is acquired by the several members, with certain exceptions, falls into and becomes part of the common fund, and the expenses of all members are met from this common fund: no account being taken of excess in the expenditure of some over the expenditure of other members. This community of worship and property being the ordinary condition of a Hindu family, it is to be presumed that a Hindu family is undivided until the contrary is shown, and that the acquisitions of the several members form part of the common stock unless the acquirer, or those claiming under him, prove that it was acquired in such a manner as would, by the special provisions of the law, constitute it the sole property of the acquirer.

Moreover, "according to the true constitution of an undivided Hindu family, no individual member of the family whilst it remains undivided, can predicate of the joint and undivided property that he has a certain share." —*Appovier v. Rama Subba Aiyar* (11 Moore's Ind. App. 75) : while a Full Bench of the High Court of Calcutta has gone so far as to hold, in *Sudabart Prashad Sahu v. Foolbush Koer* (12 W. R. F. B. 1: s.c. 3 B. L. R., F. B., 31), that under the [110] Mitakshara law one of the several members of a joint Hindu family cannot, without legal necessity, alienate any portion of the

undivided ancestral property without the consent of the whole of the co-sharers, and that such an alienation is not valid, even for the share to which the alienor would have been entitled on partition.

The condition of an undivided family being such as has been described, it is not unintelligible that rules may govern the distribution of the joint inheritance different from those which would regulate the devolution of separate property : and it has been ruled that in one and the same family different rules may govern the succession to the estate of a deceased member according to the nature of the different properties comprising it, whether it be joint or separate—*Kutama Natchiar v. The Rajah of Shivagunga* (9 Moore's Ind. App. at p. 610).

The peculiar incidents of the joint property of an undivided family are survivorship and the right of representation. In the *Shivagunga* case above cited, the Lords of the Privy Council declared that, “according to the principles of Hindu law, there is coparcenership between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession” (at p. 611). It has been argued that this is a mere statement of the general rule, and that it does not necessarily follow from it that the benefit of survivorship extends to all, and not only to some of the surviving members of the family. When once the principle of survivorship is admitted, it is difficult in the absence of express law to limit its operation. The principle of survivorship taking effect on the common fund, in which no one of the members of the family has any distinct share, operates not to augment the rights of any particular class of the coparceners, but to enlarge the shares which upon partition would fall to the lot of every one of the members. In effect, by the operation of this rule, the share to which a coparcener dying without issue would have been entitled does not pass by descent but lapses. The right of representation operates at the time of partition to secure an equal parti- [111] tion of the inheritance between the several sons of the common ancestor and the issue to the third generation of sons who have died leaving issue surviving the period of distribution, such issue taking *per stirpes* the share of their father or forefather—“Should a younger brother die before partition, his share shall be allotted to his son, provided he had received no fortune from his grandfather. That son's son shall receive his father's share from his uncle, or from his uncle's son, and the same proportionate share shall be allotted to all the brothers according to law. Or if that grandson be also dead his son takes the share; beyond him the succession stops.”—*Katyayana*—cited in *Vyavahara Mayukha*, ch. iv, s. 4, v. 21. “Although grandsons have by birth a right in the grandfather's estate equally with sons, still the distribution of the grandfather's property must be adjusted through their father, and not with reference to themselves. The meaning here expressed is this: if unseparated brothers die, leaving male issue, and the number of sons be unequal, one having two sons, another three, and a third four, the two receive a single share in right of their father, the other three take one share appertaining to their father, and the remaining four similarly obtain one share due to their father. So if some of the sons be living and some have died leaving male issue, the same method should be observed: the surviving sons take their own allotments, and the sons of their deceased brothers receive the shares of their own fathers respectively. Such is the adjustment prescribed by the text”—*Mitakshara*, ch. i, s. 5, v. 2. “A grandson *D* whose father *B* is dead, and

a great-grandson *F* whose father *E* and grandfather *C* are dead, participate equally in the inheritance with the son *A*, for they without distinction confer equal benefits on the deceased owner of the property by the presentation to him of funeral offerings at solemn obsequies."—Daya-Krunga Sangraha, ch. i, s. 1, v. 3. Unless authority be shown to the contrary, these incidents of the joint estate of an unseparated Hindu family, survivorship and the right of representation, govern the case before us and determine the answer to be given to the question put to us. The fathers and uncles of the parties lived as an unseparated Hindu family in possession of an undivided estate. Assuming partition to be made now, there are living representatives of two sons only of the common ancestor, and equal partition being made [112] between the stocks, each stock is entitled to one moiety, but it is argued that, inasmuch as the father of the one line died before any of his three brothers, and the father of the other line died after two other brothers, who died without male issue, the shares of the brethren dying without male issue descended to the sole surviving brother and passed from him to his issue—to the exclusion of the line of the brother who died first—in other words, it is contended that the case is not to be governed by the law of survivorship, except so far as to exclude females, but that the shares of the deceased brothers passed to the surviving brother in virtue of the rule that, "in case of competition between brothers and nephews, the nephews have no title to succession, for their right of inheritance is declared to be on failure of brothers."—Mitakshara, ch. ii, s. 4, v. 8. No doubt, if this rule was intended not only to apply to the descent of the separate property of a brother but to operate on the share which he would have taken in the common property of the family had he survived the period of partition, the contention is correct; but if we carefully examine the system on which the Mitakshara is compiled and bear in mind the principles of Hindu Law, as to which there can be no dispute, it will appear that the rule on which the contention is based cannot apply to the undivided ancestral estate, nor to anything which has accrued to and become part of that estate. The author of the treatise commences with a definition of heritage, "daya," and distinguishes between the wealth of a father or grandfather which *becomes the property* of his sons or grandsons *by right of their being his sons and grandsons*, and which the author consequently terms unobstructed, and property which *devolves* on parents, brothers and the rest, *on the demise* of the owner without male issue, and which he terms liable to obstruction, because existence of issue or the survival of the owner impede its devolution. After investigating the nature of property and reviewing the methods by which it may be acquired, he declares the fundamental principle of the Hindu Law obtaining in these Provinces that property in the paternal or ancestral estate is by birth. He next describes the limitation to which the power of the father over ancestral and acquired wealth is subject, and having previously defined partition to be "the adjustment of divers rights regarding the whole, by distributing them on particular portions of the aggregate," [113] he proceeds to declare in what manner and subject to what rules the common property of the family is to be distributed by partition in the father's lifetime or after his decease. The consequence of the doctrine that a right in the paternal ancestral estate is acquired by birth is that there is in fact no devolution of the property from one owner to another, but that as each son comes into being he forthwith acquires a right which would, on partition, reduce the shares of the other sons, and which, should he not survive partition and have issue, his son or grandson would take by substitution, and which, if he dies before that period, will simply lapse. There being no devolution of the property, the laws of descent are inapplicable. An ascertainment of the rights of the several members of the family is effected by partition, and consequently the

rules regulating partition in every Hindu work on inheritance take the place of rules regulating the descent of property from an owner leaving issue. Unless there is a plain direction to the contrary, rules of partition from their very nature operate at the time when the partition is made. Unless it is expressly declared that the ascertainment of shares is to be made at an earlier period, it must be assumed they are to be ascertained at the time partition is made. Seeing that a son in the undivided family is a co-owner, having acquired his right by birth, there is no more reason for fixing the date of the death of the father as the period at which shares should be ascertained than in fixing the date of a son's death as that period : and if shares are not ascertained until the period of distribution ; if, until that time, no one can declare he has any share in the common property, it accounts for the circumstance that in none of the treatises on Hindu Law which have been brought to our notice is there any rule declaring what is to be done with the interest (it can hardly be called a share) in the common property which has been acquired by a member of the family who has not survived the period of distribution. On the other hand, there are express rules declaring that the partition is to be an equal partition, subject to the qualification that those who take by representation take only the share which he whom they respectively represent would have taken, had he survived partition.

Having in ch. i dealt with the distribution of the estate of a Hindu who dies leaving issue, and having declared the rules which provide for the distribution of the paternal and ancestral pro-[114]perty of the undivided family, the author next proceeds in ch. ii to treat of the descent of the estate of a man who dies without issue. The first section clearly relates only to separate property. It presumes the case of a man who, leaving no male issue, could not be the founder of an undivided family. - "That sons, principal and secondary, take the heritage, has been shown. The order of succession among all tribes and classes, on failure of them, is next declared." Here then we pass from a law of partition to a law of devolution of inheritance, the persons entitled no longer acquire an interest by birth. It accrues on the death of the owner, and to be entitled to claim they must survive the owner, and first in the line of descent the author places the widow, and after explaining that, if the proprietor died in union with his brethren, the widow has merely a right of maintenance, he concludes the discussion of her claims with the declaration that a wedded wife, being chaste, takes the whole estate of a man who, being separated from his co-heirs, and not subsequently re-united with them, dies leaving no male issue.

In the second section the right of succession of daughters and daughter's sons are declared. Now in this section there is no distinct allusion to separate property, yet it has never been doubted that it deals only with separate property, and the intention is evident from the commencement of the section :— "On failure of her (the widow), the daughters inherit." The widow could only take separate property and the daughters succeed to what, if she had survived the *propositus*, the widow would have taken. Similarly, the following section, which treats of the rights of parents, commences with the declaration :—"On failure of those heirs, the two parents, meaning the mother and father, are successors," preference being given to the mother. In this section again there is no mention of separate property, but it manifestly deals only with that property, for it is declared that the parents take, in default of widow, daughters, and daughter's sons.

We now arrive at the fourth section, which treats of the rights of brothers, and which it is argued governs the case before us. That section commences like the preceding by premising the failure of the heir whose right had been last declared ; and from this circumstance it must again be inferred that the

property to which it regulates the [115] succession is such property as would have been taken by the heirs entitled to priority of succession, had they survived the *propositus*. If it be held that the interest which a coparcener acquires by birth does not lapse on his death without male issue, but passes under the law of succession to heirs other than direct issue, who presumably do not exist, and other than his widow, whose title is expressly denied, it follows that the right would devolve not on brothers only, but on those heirs also who are entitled to succeed in priority to brothers. Thus, a daughter, a daughter's son, a mother, or a father, might, on partition, claim the share of a deceased coparcener. No instance is cited in which such a claim has been allowed. The conclusion seems clear that s. 4, like the preceding sections of the chapter, provides only for the devolution of the separate estate of the *propositus*.

But in support of the contention that the interest of a member of an undivided family in the common fund is a share, and that the rules respecting the succession of brothers operate, notwithstanding the *propositus* may have died in union with his brethren, and regulate the inheritance of that share, reference has been made to the provisions of s. 9, which treat of the succession to reunited kinsmen.

It is argued that brethren who have reunited are in the same position as those who have never separated; that the whole of the property is again brought into a common fund, each brother saying to the other "what is mine is thine and thine is mine," yet nevertheless the interest of each is described as his *share*:—"A reunited brother shall keep his *share* of his reunited co-heir who is deceased"—Yajnavalkya, cited in Mitakshara, ch. ii, s. 9, v. 1--and inasmuch as on the death of a reunited brother without male issue his share devolves on reunited brethren of the whole blood, to the exclusion of reunited brethren of the half blood, or if there be no brethren of the whole blood in reunion, the reunited brethren of the half blood and the unassociated uterine brothers divide the share equally, it is contended that the principle of survivorship does not operate to overrule the rules regulating the succession of brothers, but that so far as is possible effect is given to both.

[116] To these arguments it may be replied that a distinction is recognized by Hindu writers between undivided and reunited brethren (Colebrook's Digest, ccxxx). Moreover, a reunion implies a previous partition, in virtue of which each of the reunited brethren has acquired separate ownership of a share. He brings to the reunited fund something which is specially his, while in an undivided family he acquired his right by birth in the estate of his father or grandfather. Again, when a partition is made of the property of an undivided family, no distinction is made between the half-blood and the whole blood:—"If any immoveable property of divided heirs, common to brothers by different mothers, have remained undivided, being held in coparcenary, the half-brothers shall have equal shares with the rest, but the uterine brother has the sole right to the divided property, moveable or immoveable" (Colebrook's Digest, cccxxxii); and on partition of the common property of reunited brethren the eldest never enjoyed the privilege, now in all cases obsolete, of receiving a larger or better portion than his brethren, to which Hindu writers declared him entitled, on a partition of the property of the undivided family. It is dangerous then to draw an analogy from the special rules which apply to the devolution of the shares of reunited brethren. Indeed, the circumstance that rules have been specially prescribed to regulate the devolution of the common property of reunited brethren affords ground for arguing that they were exceptions to the ordinary rules regulating the partition of the common property of an undivided family.

If then the provisions of ch. ii, s. 4, are not applicable to the interest of an undivided coparcener in the common property, but that interest lapses on his death without issue, it follows that, in the case before the Court, the interest

of the brothers who died without issue do not devolve on the last surviving brother, and that the sons of the last surviving brother are only entitled to one moiety of the estate. This conclusion is supported by the opinions of the three Pandits examined by the Subordinate Judge of Benares, although the reasons given by one of those gentlemen for the conclusion at which he has arrived are not satisfactory. It is also supported by the decision of the Sudder Court of Calcutta in *Duljeet Singh v. Sheomunook Singh* (I. S. D. Rep. 59), to which Mr. Colebrooke was a [117] party, and by the decision of the Bombay Court in *Bhugwan Golab Chund v. Kriparam Anundram* (2 Borr. 29). The decision of this Court in *Madho Singh v. Bindessery Roy* (H. C. R., N.-W. P., 1868, p. 101), it is true, is opposed to these authorities, but in our judgment that ruling cannot be supported.

NOTES.

[This case was followed in (1877) 2 Cal. 379, (1878) 4 Cal. 425. The case of 17 Cal. 33 wherein this case was cited was overruled in 25 Mad. 678 P. C.]

[1 All. 117.]

FULL BENCH.

The 27th August, 1875.

PRESENT :

MR. JUSTICE TURNER, OFFICIATING CHIEF JUSTICE,
MR. JUSTICE PEARSON, MR. JUSTICE SPANKIE, AND MR. JUSTICE OLDFIELD.

Daia Chand and others.....Defendants

versus

Sarfraz and others.....Plaintiffs.*

Redemption of mortgage— Limitation—Acknowledgment of title of mortgagor or of his right to redeem—Act IX of 1871, sch. ii, 148.

Where the defendants attested as correct the record-of-rights prepared at a settlement with them of an estate in which they were described as mortgagees of the estate, but which did not mention the name of the mortgagor, held (SPANKIE, J., dissenting) that there was an acknowledgment of the mortgagor's right to redeem within the meaning of article 148,† sch. ii, Act IX of 1871.

* Appeal under cl. 10 of the Letters Patent, No. 4 of 1875.

†[Art. 148, Sch. ii :—

Description of suit.	Period of limitation.	Time when period begins to run.
Against a mortgagee to recover possession of immoveable property mortgaged.	Sixty years	... The date of the mortgage, unless where an acknowledgment of the title of the mortgagor or of his right of redemption has, before the expiration of the prescribed period, been made in writing signed by the mortgagee or some person claiming under him, and in such case, the date of the acknowledgment. Provided that all claims to redeem arising under instruments of mortgage of immoveable property situate in British Burma, which have been executed before the first day of May 1868, shall be governed by the rules of limitation in force in that Province immediately before the same day.]

Per PEARSON, J.—That there was also an acknowledgment of the mortgagor's title.

Per SPANKIE, J., contra.

THE plaintiffs sued to redeem a mortgage of the entire 20 biswas of mauza Pal, pargana Jauli Jansath, zilla Saharanpur, alleged to have been made in 1811 for Rs. 241 by their ancestors to the ancestors of the defendants. The latter denied the mortgage, alleging that they were the proprietors of the estate. From the evidence adduced it appeared that in 1863 the plaintiffs applied to the revenue authorities to record their names as the mortgagors of the estate, but the application was refused. In May, 1872, at the instance of the defendants, the entry of the word "mortgagee" opposite the names of the defendants in the *khewat* annually prepared by the patwari was directed to be discontinued. The first Court, looking at these circumstances, treated the suit as one for the possession of land and dismissed it, holding that it should have been valued at five times the revenue payable to Government in respect of the property in suit, instead of according to the principal amount [118] of the mortgage-money. The lower Appellate Court held that the suit was correctly valued. It disallowed a plea taken by the defendants to the effect that the suit was barred by the law of limitation as it appeared that the defendants' ancestors had signed the *khewat* and the *khatauni shara asamirwar* prepared at the settlement of the estate with them under Regulation IX of 1833 in 1841, in which they were described as mortgagees, which it held amounted to an acknowledgment of the plaintiffs' title as mortgagors, and remanded the suit to the first Court for disposal on the merits.

The *khewat* of 1841 made no mention of the nature of the mortgage and none of the mortgagors. The parties who signed it were described as holding certain shares and as mortgagees. There was no record of the names of the owners of the shares. The *khatauni shara asamirwar* showed the rates of rent payable by tenants. The parties who signed that paper were also described as mortgagees. There was a note by the officer making the settlement that "the parties in possession are mortgagees, but the amount of the mortgage and its duration are unknown; it occurred before British occupation." The parties did not, in affixing their signatures to either document, add the word "mortgagees." The *khewat* was not confined to a record of the distribution of the shares and the interest of the parties as mortgagees. It contained the *ikrar-nama*, or *wajib-ul-arz*, being a record of agreement between the coparceners amongst themselves, on various matters, and a detail of customs, etc., prevailing in the estate. The signatures were affixed at the foot of the document. The Tahsildar recorded that, after all the particulars of the *ikrar-nama*, and the amount of rupees had been read out to the parties, they affixed their signatures and marks with their own hands. Similarly, with the *khatauni shara asamirwar*, the Tahsildar recorded that the parties, after hearing the rates of rent, had affixed their signatures and marks, and verified all the particulars entered in the document.

On special appeal to the High Court from the order remanding the case the defendants contended that the signatures of their ancestors to the documents did not amount to an acknowledgment of the plaintiffs' title as mortgagors or of their right to redeem, within the meaning of Act IX of 1871, sch. ii, 148. They also contended, with reference to an order passed in the settlement department in [119] January, 1864, which refused an application by the plaintiffs for the entry of their names in respect of certain unculturable lands and trees in the village and referred them to a Civil Court, that the suit was barred by limitation, not having been instituted within three years from the date of that order.

The learned Judges of the Division Court (PEARSON and SPANKIE, JJ.), before which the appeal came on for hearing, differed in opinion.

The following **Judgments** were delivered :—

Pearson, J.—This is a suit for the redemption of a mortgage said to have been made in favour of the defendants' ancestors by the ancestors of the plaintiff's in 1811, and was dismissed by the Court of First Instance improperly on the ground of insufficient valuation. The lower Appellate Court has rightly held the valuation to be correct, and, disallowing a plea set up by the defendants to the effect that the suit was barred by the law of limitation, has remanded the case to the first Court under s. 351, Act VIII of 1859, for trial and disposal on the merits. The plea of limitation has been disallowed with reference to an acknowledgment of their mortgage tenure recorded in the settlement record of 1841, which is signed by the defendants or their forefathers. In that record they described themselves, or allowed themselves to be described, as mortgagees of the estate in question; and by so doing admitted by implication the title of the mortgagors, whoever they may be, and their right to redeem the property. Whether the plaintiffs' ancestors were the mortgagors and whether the mortgage was made by them in 1811, for a consideration of Rs. 241, are questions which must be determined before it can be decided whether the suit can be maintained. Even if it be established that the plaintiffs' ancestors were the mortgagors, unless it be shown that the mortgage was not made before 1811, it may be found that the suit is barred by limitation. But although the Subordinate Judge's decision is open to this objection, that he has somewhat precipitately declared the suit not to be barred by limitation, while not quite consistently remarking that, "if the plaintiffs can prove the mortgage to have been effected by their ancestors in favour of those of the defendants in 1811, they will obtain a decree, if not, their claim must be rejected," there is nothing objectionable in his remand order on the [120] assumption that the materials on the record were not sufficient to enable him to decide satisfactorily himself. There is no force in the grounds of appeal. Nothing is shown to be a bar of the suit in the proceedings of 1864, which referred to a claim of certain manorial rights only. The admission of the mortgage tenure in the settlement record of 1841, if it can be referred to the plaintiffs' ancestors, and the mortgage be found to have been made by them in 1811, is sufficient to give a new period of limitation from the date of the admission. With these remarks, the appeal is dismissed with costs.

Spankie, J.—Article 148, sch. ii, Act IX of 1871, provides that time shall run from the date of the mortgage, unless when an acknowledgment of the title of the mortgagor, or of his right of redemption has, before the expiration of the prescribed period, been made in writing, signed by the mortgagee or some person claiming under him and, in such case, the date of the acknowledgment.

It is argued in this case that some of the ancestors of the defendants, appellants, attested as correct the *kherat* and *khatauni shara asamiwar* prepared at the settlement under Regulation IX of 1833 in 1841, in which they are described as mortgagees. Their signatures, it was contended, are an acknowledgment of the mortgage tenure, and take the case out of the operation of the limitation law. The learned Judge, after stating the facts relating to the *kherat* and the *khatauni shara asamiwar*, continued):—It will be seen from what I have stated that the parties who signed have not acknowledged any particular fact, but their signatures must be taken as an admission of the general accuracy of the *kherat* and *khatauni*, the one containing a variety of matter, the other having the special object of showing the rent payable to the landlords by their tenants.

I may also mention that there did not appear to be any recognised owners in 1841, the entire 20 biswas being in the possession of persons described as mortgagees. I attribute this description to be due to some report regarding an earlier settlement and the state of the village then, obtained from the office when the settlement under Regulation IX of 1833 was made.

[121] I do not regard the signatures of the ancestors of the defendants, under the circumstances described, as amounting to an acknowledgment of the title of the mortgagor or of his right of redemption, within the meaning of article 148, sch. ii, Act IX of 1871. The record shows that the appellants did not acknowledge any right of redemption anywhere. They contested in 1863 an attempt of the heirs of the mortgagors to establish their right of redemption, and ultimately in 1872 they succeeded in obtaining an order from the revenue authorities for the erasure of the word mortgagees.

If we look at the effect of an acknowledgment in writing in respect of a debt or legacy (s. 20, Act IX of 1871), we find that no promise or undertaking would take the case out of the operation of the Act, unless the promise or acknowledgment amounts to an express undertaking to pay or deliver the debt or legacy, or to an unqualified admission of the liability as subsisting. So I think that any one who desires to take his claim out of the operation of article 148, sch. ii, must show a clear and express acknowledgment in writing of the title of the mortgagor or of his right to redeem, that this acknowledgment must be unqualified and made touching the mortgage. It cannot be implied from a general admission of the accuracy of certain settlement records dealing with a great variety of matters.

I, therefore, would decree the appeal, reverse the judgment of the lower Appellate Court, and restore that of the first Court, with costs.

The defendants appealed to the Full Court, under the provisions of cl. 10 of the Letters Patent, against the judgment of PEARSON, J.

Munshi Hanuman Parshad (with him Babu Jogindro Nath Chaudhari) for the Appellants, contended that the mere signatures of the mortgagees to a document, in which they were described as mortgagees, and which did not show who the mortgagor was, or the nature of the mortgage, or the amount of the mortgage-money, did not amount to an acknowledgment of the title of the mortgagor or of his right to redeem. There is no written acknowledgment touching the mortgage, signed by the mortgagees, which expressly, or by implication, acknowledges the title of the mortgagor or of **[122]** his right to redeem. The entry in the documents was made by the settlement officer.

Pandit Bishambhar Nath for the Respondents.—The mortgagees were in possession of the property. They assigned to themselves at the settlement of the estate the position of mortgagees. The entries were made on their representation, and are signed by them. The statements recorded are accepted by them. This amounts to an acknowledgment of the title of the mortgagor, whoever he may be.

Turner, Offg. C.J., and Oldfield, J., concurred in the following opinion :—

The question which arises in this appeal is whether or not there has been a sufficient acknowledgment of the mortgagor's title or his right to redeem to prevent the operation of the law of limitation, or rather to give the representatives of the mortgagors a new period from which limitation should be computed.

The terms of the law, an acknowledgment of the mortgagor's title or an acknowledgment of his right to redeem, were not, it may be presumed, intended

to be mere tautology. An acknowledgment that a certain person, or his representative, is the proprietor of the estate is an acknowledgment of his title. An acknowledgment that the mortgage is a subsisting mortgage would be an acknowledgment of his right to redeem, if he established his title.

The provisions of the English Statute 3 & 4 Will. 4, c. 27, s. 28, require, in order to enlarge the statutory period of limitation, that an acknowledgment of the title of the mortgagor or of his right to redemption shall be given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming. It appears to be the law that any acknowledgment, which before the passing of the English Statute would have been sufficient, will satisfy the requirements of the Statute if it be given in writing to the mortgagor or to a person claiming his estate, or to the agent of such mortgagor or person.—Fisher on Mortgages, 2nd ed., vol. i, 502, page 288. Before the Statute was enacted it was held that an acknowledgment of the mortgage as a subsisting mortgage was an acknowledgment of the mortgagor's right to redeem; and in a case [123] quoted by Lord Hardwicke it was held by Sir J. Jekyll that, where a testator described an estate in his will as my "mortgaged estate," it was a sufficient acknowledgment of the mortgagor's right to redeem (3 Atkyn's Rep., at p. 114). This ruling appears never to have been overruled; it is quoted in Tudor's Leading Cases, vol. ii, 4th ed., 1065. We are not, indeed, bound by English cases, but we may usefully consult them.

With the exception that it requires the acknowledgment to be in writing, the law of limitation in this country, so far as it applies to the question before us, appears to be analogous to the English law as it was established by the practice of the Courts of Equity before the Statute above referred to was enacted. The law of British India does not require that the acknowledgment should be given to the mortgagor, but, in other respects, it follows the language of the English Statute and the practice of the Courts of Equity before that Statute was enacted. The acknowledgment must be in writing, signed by the mortgagee or a person claiming under him, and it must acknowledge the title of the mortgagor or his right to redeem. In the case before us the settlement officer had prepared the record-of-rights, a record which by law he was bound to prepare, showing the interests in the village of which he found persons in possession. From the records of preceding settlements he ascertained that the appellants, or rather their predecessors in title, had obtained possession in virtue of a mortgage, and he entered them accordingly in his record as mortgagees. To this record, for the purpose of certifying to its correctness, he obtained the signature of those whom he found in possession, and, amongst others, of the appellants. This appears to be a stronger case than that decided by Sir J. Jekyll. Here there is not a mere description of the estate as a mortgaged estate, but a subscription to a record purporting to show the extent of the rights which the persons in possession enjoyed. For this reason we hold the acknowledgment sufficient, and would dismiss the appeal with costs.

Pearson, J.—There can be no doubt that the settlement record of 1841 does not contain an express acknowledgment of the title of any particular persons as owners of the estate in question in this [124] suit or of their right of redemption, for the mortgagors or their representatives are not named. If, therefore, such an express acknowledgment be required by the terms of article 148, sch. ii, Act IX of 1871, the present suit, instituted in 1874 for the redemption of a mortgage alleged to have been made in 1811, is liable to be dismissed as barred by the law of limitation. I still adhere to the opinion intimated in my judgment

of the 8th April last, that such an express acknowledgment is not required, and the acknowledgment of a subsisting mortgage tenure is by implication an acknowledgment of the title of an owner and of his right to redeem, and sufficiently for all practical purposes complies with the terms of the law. It is not reasonable to suppose that any one would allow himself to be described as the mortgagee of a property of which the mortgage had ceased to be redeemable at law, and the names of the owners thereof had been lost to knowledge by lapse of time, without any mention of those circumstances. In the present case there are no grounds for supposing that in 1841 there was any doubt or dispute as to who were the owners, or whether they were entitled to redeem the property in suit. The addition of their names, though it would have completed the statement of the facts, was hardly necessary, and the omission of their names was presumably accidental. An acknowledgment of a mortgage tenure, not including the title of a mortgagor and of a right to redeem, appears to be meaningless, useless, and absurd. The main point is whether the tenure is that of a mortgagee; it can make no difference to the mortgagee whether the owner is *A* or *B*. If it be held that an entry describing *C* as mortgagee of a share, acknowledged by *C*, would be an acknowledgment that would satisfy the requirements of the law, it cannot plausibly be contended that an entry describing *C* as mortgagee does not describe a subsisting mortgage tenure. But if there were any real doubt as to whether the acknowledgment implied in a man's description of himself as a mortgagee referred to a subsisting mortgage, or one which had ceased to be redeemable, the doubt might easily be removed by an enquiry as to whether the mortgage had or had not ceased to be redeemable at law at the date of the acknowledgment.

The view which I have taken as to what constitutes a sufficient acknowledgment is apparently not at variance with English law. [125] In page 288, vol. i., Fisher's Law of Mortgage, it is stated that "any expression referring to the estate as mortgaged will be a sufficient acknowledgment." The description by a man of himself as the mortgagee of an estate is surely a reference to the estate as mortgaged to him. In the case of *Stansfield v. Hobson* (3 De G. Mac. & G. 620; s. c. 16 Beav. 236; 22 L. J. Chanc. 657), cited in support of the doctrine, the reference to the estate, as one of which the mortgage was redeemable, did not express the name of the party entitled to redeem, which was ascertained by external evidence. This case establishes both the points for which I contend; first, that an acknowledgment of a mortgage tenure is by implication an acknowledgment of the title of an owner; and secondly, that other evidence may be admitted to show who is the person possessing that title to whom the acknowledgment referred. In that case the evidence indicating the owner may have been nearer at hand than in the present case; but that difference does not affect the principle that an acknowledgment of a redeemable mortgage may be connected by evidence with the person entitled to redeem it. On the other hand, it is observable that the acknowledgment in that case not only did not specify any particular person as the owner, but that it did not specify any particular property as the subject of the mortgage; and further, that it was apparently made after the lapse of the period of limitation, when the right of redemption, if it had not been extinguished, could not be enforced at law. The acknowledgment, indeed, which was deemed sufficient to take the case out of the ordinary operation of the law of limitation was no more than an answer by the mortgagee to a proposal on behalf of the mortgagor for a meeting for the purpose of considering the matter of the debt, to the effect that, unless some one was prepared to pay the debt, a meeting would be useless. It was held that, by that answer, a

right of redemption had been admitted ; and the admission was supplemented by evidence which pointed out the mortgagor and the mortgaged property. In the present case the acknowledgment takes the form of a description by the defendants' ancestors of themselves as mortgagees of the property in question on the public and solemn occasion of a settlement, the mortgage not being known to have been irredeemable at law at the time, and a [126] clue to the names of the owners being found in the settlement records.

At page 314 of Atkyn's Reports mention is made of a case in which Sir J. Jekyll decreed a redemption upon the circumstance of the person who was in possession of an estate originally in mortgage calling it by the name of the mortgaged estate in his will. This case supports my judgment not less than that of *Stansfield v. Hobson* above quoted.

Spankie, J.—I am under the impression that my honourable colleagues take a different view of this case than I do. I, therefore, would simply say that I adhere to my former judgment. Nothing was stated at the hearing which shows me that my opinion was wrong, and I can add nothing to what I have already put on record.

NOTES.

[ACKNOWLEDGMENT—

It must be of a subsisting right : (1882) 9 Cal. 616 ; (1900) 27 Cal. 1004 at 1011 P. C. ; as to when it must be by all and not some of the mortgagees, see (1893) 17 Bom. 173 citing 12 P. R. 162 ; as to sufficiency of an acknowledgment contained in (a) deposition see (1892) 16 Mad. 220 ; 16 Cal. 246 ; (b) *wajib-ul-urz* see (1909) 5 I. C. 77 (All). See also (1908) 10 Bom. L. R. 385 ; (1908) A. W. N. 226 ; 8 A. L. J. 605 ; 10 I. C. 238.

As to further stages of this case see 1 All. 425.]

[1 All. 126]

APPELLATE CIVIL.

The 15th December, 1875.

PRESENT :

MR. JUSTICE PEARSON AND MR. JUSTICE TURNER.

Chunni.....Defendant

versus

Thakur Das and others.....Plaintiffs.

Mortgage—Condition against Alienation—Auction-purchaser.

A transfer of mortgaged property made in contravention of a condition not to alienate is not absolutely void, but voidable in so far as it is in defacement of the mortgagee's rights.

Where, in contravention of a condition not to alienate, the mortgagor had transferred his proprietary right in the mortgaged property to a third person for a term of years, the Court declared that such transfer should not be binding on a purchaser at the sale in execution of the decree obtained by the mortgagee for the sale of the property in satisfaction of the mortgage-debt, unless such purchaser desired its continuance.

DALGANJAN mortgaged to the plaintiffs, by a deed dated the 24th November, 1870, a share in a certain village as security for the repayment of a

* Special Appeal No. 1000 of 1875, from a decree of the Judge of Bareilly, dated the 8th August 1875, reversing a decree of the Subordinate Judge, dated the 28th February 1875.

loan made to him by the plaintiffs. The mortgage [127] deed contained a condition against alienation to the following effect:—"I will not transfer the mortgaged property to any one else until the principal sum together with interest is repaid. Should I transfer it the transfer shall be illegal." The mortgagor, under the terms of the deed, continued in possession of the property. On the 9th October, 1874, Dalganjani granted the defendant a "lease" (*katkina*) of his rights as zamindar and malguzar in the share for a term of 11 years from 1282 fasli (1874-75) to the end of the rabbi harvest of 1292 fasli at a fixed annual rent of Rs. 291 on these, amongst other, conditions—that the lessee should duly pay the Government revenue, instalment by instalment, together with the cesses, as also the annual rent, instalment by instalment—that no increase or reduction, during the term of the lease or at any settlement, in the Government revenue should affect the lessor—that the lessee should be liable for the carrying out of Government orders, and the expenses connected therewith—that while he held under the lease the lessee should keep the ryots satisfied—that during the term of the lease the lessee should not be at liberty to surrender the estate. The plaintiffs obtained a decree on the 5th December, 1874, for the sale of the mortgaged property in satisfaction of the mortgage-debt.

They instituted the present suit for the invalidation of the lease, alleging that it was granted at a low rate of rent, in bad faith, with the object of frustrating the execution and satisfaction of their decree. The defendant Chunni pleaded that the plaintiffs had no cause of action against him, as he took the lease in good faith prior to the passing of the decree, and the lease in no way hindered them from enforcing their lien on the property.

The first Court dismissed the suit on the ground that there was nothing to show that the lease was granted in bad faith, and that the stipulation in the deed of mortgage against the transfer of the property did not prevent the mortgagor from granting a lease of it. It remarked that the plaintiff might bring the property to sale notwithstanding the lease, and that their statement that the property would fetch a small price at an auction-sale in consequence of the lease was merely conjectural. On appeal by the plaintiffs they contended that the stipulation in the mortgage-deed rendered the [128] lease invalid, and that the lease would interfere with the auction-sale of the property, as no one would be willing to purchase it subject to the lease. The lower Appellate Court held, with reference to a ruling * of the late Sudder Court that the lease was invalid, being a violation of the stipulation against alienation contained in the mortgage-deed.

On special appeal to the High Court by the defendant Chunni, it was contended on his behalf that the stipulation in the mortgage-deed was a mere personal covenant binding on the mortgagor, but which did not bind him, and which could not defeat his right to hold under the lease for the term it was granted, the lease being a *bona fide* lease; that it was not shown that the lease obstructed the rights of the mortgagee; and that the plaintiffs had no cause of action against him, the lease having been granted and taken in good faith.

* 8 S. D. A., N.-W. P., 341. See another case of a lease—*Gossain Mungul Doss v. Rughoonath Sahay*, 17 W. R., 560, and as to such conditions generally—see on the one hand *Heera Lal v. Rutchpal*, 6 S. D. A., N.-W. P., 39; *Mithoo Beebee v. Madho Pershad*, 7 S. D. A., N.-W. P., 614—and on the other, *Gungaprasad Singh v. Beharee Lal*, S. D. A., L. P., 1857, p. 825, and the cases there cited. Where the transfer is made *bona fide* for the purpose of paying off the mortgage-debt, a condition not to alienate cannot operate to annul it, see *Dookchore Rai v. Hajee Hidayut-ool-lah*, H. C. R., N.-W. P., F. B., 1866-1867, p. 7; but the debt must be at once discharged by the transfer, see *Mahomed Zakaullah v. Janee Pershad*, H. C. R., N.-W. P., 1869, p. 40. See also *Kondun Lal y. Wazir Ali*, H. C. R., N.-W. P. 1871, p. 205.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*) for the Appellant.

Mr. Colvin and Babu *Jogendro Nath* for the Respondents.

The Judgment of the Court was as follows:—

The lease is not a lease merely for agricultural purposes, but a transfer * of the interest of the proprietor for a term of years. Is it a violation of the condition against alienation? It has been held [129] that such conditions are introduced to protect the lien created by the mortgage, and that a transfer made in contravention of the condition is not absolutely void, but voidable so far as it is in defeasance of the mortgagee's rights. In the present case the mortgagees have obtained a decree for the sale of the estate in satisfaction of the loan. The existence of the lease may induce purchasers to offer a less price of the property than they would offer if they could obtain immediate possession. On the other hand, the lease may be an arrangement highly beneficial to the owner of the estate and thus a substantial increment to its value. The mortgagees will have obtained all that in equity they are entitled to, if the Court gives them a declaration that the lease will not be binding on a purchaser in execution of the decree, unless he desires its continuance. The decrees of the Courts below will be modified accordingly, but as the appeal substantially fails, we must order the appellant to bear the respondents' costs.

NOTES.

[See also (1878) 1 All. 610; (1882) 4 All. 518; 10 A. W. N. 59; (1882) 5 Mad. 184.]

* As to the meaning of "transfer," when used in a *wajib-ul-arz*, see *Chuttur Mull v. Chuttur Kishore Lall*, H. C. R., N.-W. P., 1868, p. 396. In that case it was ruled that the mere transfer of property to the possession of a tenant for a term of years, who pays rent to the owner, would not fall within a prohibition not to "transfer." This refers presumably to a transfer for agricultural purposes.

[1 All. 129]

CRIMINAL JURISDICTION.

The 14th January, 1876.

PRESENT :

MR. JUSTICE OLDFIELD.

Queen

versus

Kultaran Singh.

Act X of 1872, ss. 468, 472, 473—Offence against Public Justice—Offence in Contempt of Court—Prosecution—Procedure.

An offence against public justice is not an offence in contempt of Court within the meaning of s. 473,* Act X of 1872.

But notwithstanding this the Court, Civil or Criminal, which is of opinion that there is sufficient ground for inquiring into a charge mentioned in ss. 467,† 468,‡ 469,§ Act X of 1872, may not, except as is provided in s. 472, try the accused person itself for the offence charged.

The case of *Sufatoollah*, petitioner ¶ followed.

* 22 W. R. Cr. 49; see however *Reg. v. Narraubeg Dulabeg*, 10 Bom. H. C. Rep., 73; and 7 Mad. H. C. Rep., Rulings xvii and xviii.

Offences in contempt of Court how to be disposed of. * [Sec. 473 :— Except as provided in sections four hundred and thirty-five, four hundred and thirty-six and four hundred and seventy-two, no Court shall try any person for an offence committed in contempt of its own authority.]

† [Sec. 467 :—A complaint of any offence described in Chapter X of the Indian Penal Code, not falling within section four hundred and thirty-five or four hundred and thirty-six of this Act, shall not be entertained in any Criminal Court except with the sanction or on the complaint of the public servant concerned, or of his official superior. Prosecution for contempts of the lawful authority of public servants.

The prohibition contained in this section shall not apply to the offences described in sections one hundred and eighty-nine and one hundred and ninety of the Indian Penal Code.]

‡ [Sec. 468 :—A complaint of an offence against public justice, described in section one hundred and ninety-three, one hundred and ninety-four one hundred and ninety-five, one hundred and ninety-six, one hundred and ninety-nine, two hundred, two hundred and five, two hundred and six, two hundred and seven, two hundred and eight, two hundred and nine, two hundred and ten, two hundred and eleven, or two hundred and twenty-eight of the Indian Penal Code, when such offence is committed before or against a Civil or Criminal Court, shall not be entertained in the Criminal Courts, except with the sanction of the Court before or against which the offence was committed, or of some other Court to which such Court is subordinate.]

§ [Sec. 469 :—A complaint of an offence relating to documents described in section four hundred and sixty-three, four hundred and seventy-one, four hundred and seventy-five, or four hundred and seventy-six of the Indian Penal Code, when the document has been given in evidence in any proceedings in any Civil or

Criminal Court, shall not be entertained against a party to such proceedings, except with the sanction of the Court in which the document was given in evidence, or of some other Court to which such Court is subordinate.]

|| [Sec. 472 :—A Court of Session may charge a person for any such offence committed before it or under its own cognizance, if the offence be triable by the Court of session exclusively, and may commit or hold to bail and try such person upon its own charge. Power of Court of Session as to such offence committed before itself.

In such case the Court of Session shall have the same power of summoning and causing the attendance at the trial of any witnesses for the prosecution or for the defence, as is vested in a Magistrate by this Act. Such Court may direct the Magistrate to cause the attendance of such witnesses on this trial.]

A SUIT was brought against Kultaran Singh for the recovery of arrears of rent, in which he produced a witness, Bhikam Singh, who gave evidence as to the payment of the rent by Kultaran Singh. This evidence, in the opinion of the Assistant Collector trying the suit, afforded ground for inquiry into a charge against Kultaran [130] Singh of an offence under s. 196 (using evidence known to be false) of the Indian Penal Code, and against Bhikam Singh of one under s. 194 (giving false evidence). That officer, therefore, acting in the capacity of Assistant Magistrate, proceeded to try the accused persons on the charges above-mentioned, and finding each guilty of the offence he was charged with, sentenced him to one year's rigorous imprisonment.

The High Court called for the record of the case on the petition of Kultaran Singh.

Mr. Raikes, for the petitioner, in support of the first ground of revision taken in the petition, viz., that s. 473, Act X of 1872, barred the jurisdiction of the Assistant Collector, referred to *Reg. v. Navranbeg Dulabeg* (10 Bom. H. C. Rep. 73). When express provision is made for the prosecution of offences mentioned in ss. 467, 468, 469, Act X of 1872, when they are committed before a Civil or Criminal Court, such provision should be followed in those cases, notwithstanding the Court may have power otherwise to deal with such offences. It appears from the language of s. 471 that the Court before which the offence is committed cannot itself try the accused person. It also appears from s. 472, which gives the Court power, when it is a Court of Session, to commit, or hold to bail and try, a person for any such offence committed before it, upon its own charge, only if the offence is exclusively triable by it. He referred to the case of *Sufatullah*, petitioner (22 W. R. Cr. 49).

The Junior Government Pleader (Babu Dwarka Nath Banarsi), for the Crown.—Section 471 does not bar the jurisdiction of a Court if otherwise competent. It cannot be said that a Court before which perjury is committed has any such interest in the prosecution as would render it undesirable that it should itself try the offence. The principle recognized by s. 473 does not therefore apply.

Oldfield, J. (who, after stating the facts, continued):—It has been objected on the part of Kultaran Singh that the Assistant Magistrate was not competent to try and convict the petitioner, being the Court before which the said offence was committed. This objection was urged under ss. 471 and 473, Code of Criminal Procedure.

[131] The objection is not tenable under s. 473. That section is to the effect that, except as provided in ss. 435, 436, 472, no Court shall try any person for an offence committed in contempt of its own authority of a Court. It was not intended apparently to include such offences as those which are the subject of this trial, which, under the Indian Penal Code, are classed as offences against public justice, in contradistinction to offences in contempt of the Court's authority. The Indian Penal Code has separately classified those two classes of offences, and it may be presumed that s. 473, Code of Criminal Procedure, has followed this classification, and that when it refers to offences in contempt of authority of a Court, it refers only to such as are so classed under the Indian Penal Code. As a matter of fact also, the classification of the Indian Penal Code has been followed in the Code of Criminal Procedure, and

*Sec. 467 :—[*q. v. supra* 1 All. 129.]

**Sec. 469 :—[*q. v. supra* 1 All. 129.]

† Sec. 468 :—[*q. v. supra* 1 All. 129.]

notably in s. 468 in regard to offences under s. 193, and which are classed as offences against public justice. This is the view of s. 473 taken by this Court in their answer dated the 14th September, 1874, to a reference in *Munnī* and others made by the Judge of Agra, and was held by the Calcutta Court in *Safatoollah* (22 W. R. Cr. 49).

But it appears to me that, with reference to s. 471, the Assistant Magistrate was not competent to try the petitioner for an offence under s. 196, committed before him as Assistant Collector. Section 471 is as follows :—“ When any Court, Civil or Criminal, is of opinion that there is sufficient ground for inquiring into any charge mentioned in ss. 467, 468, 469, such Court, after making such preliminary inquiry as may be necessary, may either commit the case itself or may send the case for inquiry to any Magistrate having power to try or commit for trial the accused person for the offence charged.”

This section seems to require that the Court shall either commit the case or send it to some other Magistrate, but not charge or try the person on its own charge. It appears to have been intended that the rule in s. 471 should have general application, with the one exception provided for in s. 472. That section gives an exceptional power to a Court of Session to charge and try on its own charge a person for an offence committed before it when the offence is triable by the Court of Session exclusively ; and s. 472, [132] by thus exceptionally exempting a Court of Session from the operation of the provisions of s. 471, shows what the general effect and aim of those provisions was intended to be.

To permit the Court in the present case to charge and try for the offence committed before it would be interpreting s. 471 as giving the Court a higher power than is allowed to a Sessions Court. A similar view of the effect of s. 471 was taken by the Calcutta High Court in *Safatoollah* (22 W. R. Cr., 49).

The convictions and sentences passed on Bhikam Singh and Kultaran Singh are annulled, and the Court is directed either to commit them for trial or to send the case to another competent Magistrate for disposal.

NOTES

[This case was **overruled** by the Full Bench in (1877) 1 All. 625 ; it was not followed by the Bombay High Court in 1 Bom. 311 ; 339.]

[1 All. 132]

APPELLATE CIVIL.

The 11th February, 1876.

PRESENT :

MR. JUSTICE SPANKIE AND MR. JUSTICE OLDFIELD.

Shaikh Ewaz and another.....Decree-holders

versus

Mokuna Bibi and others.....Judgment-debtors.*

Pre-emption—Conditional decree—“Final” judgment and decree.

The Court granting a decree to the plaintiff in a pre-emption suit is competent to grant the decree subject to the payment of the purchase-money within a fixed period (*contra* see *Syud Ahsan Ali v. Sabookee Beebre*, 10 W. R. 53), and if the decree-holder fails to comply with the condition imposed on him by the decree, he loses the benefit of the decree. *Sheo Pershad Lall v. Thakoor Rai* (H. C. R., N.-W. P., 1868, p. 254) approved.

When a direction contained in a decree referred to the time at which such decree should become final, held (the case being one in which a special appeal lay) that such decree does not become final on being affirmed by the lower Appellate Court, but on the expiry of the period of special appeal, or, where such an appeal was instituted, when the decision of the lower Appellate Court was affirmed by the High Court.

THE plaintiffs in a suit to establish a right of pre-emption in respect of a share in a certain village, under and by virtue of a clause in the village administration-paper to the effect that no [133] share in the village should be sold or transferred in any way to a stranger unless it had been previously offered to and been refused by all the co-sharers, obtained a decree in the first Court on the 5th January 1875, which declared their right to the possession of the share on the payment of Rs. 300 within 31 days from the date of the decree becoming final. An appeal to the lower Appellate Court by the vendees, defendants, was dismissed on the 18th March 1875, the decision of the first Court being affirmed, and a special appeal by them to the High Court was dismissed on the 27th August following, the lower Appellate Court's decision being affirmed.

The decree-holders paid the amount of the purchase-money into Court on the 1st May 1875, and prayed that possession of the property might be given them in execution of the decree.

Both the lower Courts refused execution of the decree on the ground that the decree-holders had failed to deposit the purchase-money within the time specified in the first Court's decree, holding that that decree became final on the 18th March 1875, the date of the judgment and decree passed in appeal.

On special appeal to the High Court the decree-holders contended that the right of pre-emption decreed in their favour was not lost to them by reason of their failing to deposit the purchase-money within the time specified in the decree, and that the decree did not become final till the date of the decision of the special appeal.

* Miscellaneous Special Appeal, No. 66 of 1875, from an order of the Judge of Azamgarh, dated the 24th July 1875, affirming an order of the Munsif, dated the 1st May 1875.

Mr. Mahmood for the Appellants.

Lala Lalta Parshad for the Respondents.

The Judgment of the Court was as follows :—

The first plea hardly arises in the shape in which it has been thrown. But it has always been the practice of our Courts in these Provinces to insist upon the payment of purchase-money in cases of the nature within the period prescribed by the Court. We are understood to follow the

Sheo Pershad Lall v. Thukoor Rai, H. C. R., N.-W. P., 1868, p. 254. ruling of this Court marginally noted. There a pre-emptor obtained a decree from the first Court which provided a certain time within which the sum ascertained to be the purchase-money was to be deposited. The pre-emptor appealed against the amount fixed by [134] the Court but failed. He did not deposit the money within the fixed time, and the Judge declined to enlarge the time. It was held by this Court that the plaintiff, in appealing from the original decree, could not escape from the obligation which it imposed, and the lower Appellate Court was not bound by law to insert in its decree any special direction concerning such deposit unless occasion called for it, although it was important to have done so. This ruling is not one exactly in point. But the principle laid down is the same. The Court was competent to make the direction it did as to the payment of the money, and if the decree-holder failed to comply with the obligation imposed on him by the decree, he would lose the benefit of it.

As to the second plea, the decision referred to by the lower Appellate Court, *Mirza Himmul Bahadoor v. Gobindo Panday* (5 W. R. 91) is not one in point, for the ruling there related to the question whether a plea of limitation could be heard for the first time after a remand-order on the merits had been carried out, when it had not been made the subject-matter of appeal at a previous stage. The words in the decision—"it appears to us that the judgment and decree, from which the ninety days are intended to be reckoned, are the final judgment and decree in the suit between the parties" (at p. 93)—might perhaps be misleading as to what is to be considered the final decision of the case in the suit before us. The words of the decree of the first Court are that the plaintiffs "shall make a deposit of Rs. 300 within 31 days from the date of this (the Munsiff's) decision becomes final." In our opinion a decision cannot be said to become final until the time for the last appeal allowed has expired, or, if appealed, it has become final by the decree of the High Court, as the ultimate Court in the country. In the suit before us there was a special appeal allowable under certain circumstances, and the Rs. 300 were deposited before the time fixed for the presentation of a special appeal had expired. Indeed, the special appeal was subsequently admitted and ultimately dismissed on trial on the 27th August, 1875.

Under this view of the case the order of both the Courts below is wrong.

The appeal is decreed and the decision of the lower Appellate Court reversed, and the case remanded to it under s. 351, Act VIII of 1859, for trial on the merits. Costs will abide the result.

NOTES.

[As to when a decree becomes final, see also the following cases :—(1876) 1 All. 293; (1889) 11 All. 346; (1907) 4 A. L. J. 360; (1908) 5 A. L. J. 136 = (1908) A. W. N. 13; (1881) 7 All. 107; (1901) 24 Mad. 440; 8 A. W. N. 4.]

[136] FULL BENCH.

The 25th February, 1876.

PRESENT:

SIR ROBERT STUART, KT., CHIEF JUSTICE, MR. JUSTICE PEARSON,
 MR. JUSTICE TURNER, MR. JUSTICE SPANKIE, AND
 MR. JUSTICE OLDFIELD.

Udaisingh.....Plaintiff

versus

Jagannath.....Defendant.*

Lambardar—Co-sharer—Profits—Revenue—Set-off.

Held (SPANKIE, J., dissenting), that a lambardar, who had paid an arrear of Government revenue out of the collections of subsequent years without reference to the co-sharers, was entitled, in a suit against him by a co-sharer, for his share of the profits for such subsequent years, to claim in the suit a deduction on account of such payment.

THIS was an appeal to the Full Bench, under cl. 10 of the Letters Patent, against a judgment of PEARSON, J. from which SPANKIE, J., dissented.

The facts of the case which are material appear in the judgments of the learned Judges.

Pearson, J.—The first plea in appeal appears to be valid. The defendant is the lambardar of the mahal of which the plaintiff is a co-sharer. The jama of the mahal was fixed by Mr. Lowe at Rs. 1,488-12-0. Mr. Currie reduced it to Rs. 1,275 from 1272 fasli. In 1278 fasli the Government disallowed the reduction, and directed the difference to be recovered for the previous six years. The amount was made good by the defendant in 1281 fasli, and it cannot be denied that he would be entitled, if he had paid it out of his own pocket, to recover from the plaintiff a sum proportionate to his share in the mahal. In the present suit the plaintiff claims Rs. 384-14-0 as arrears of profits due to him for 1278, 1279, and 1280 fasli. The defendant answers that he has paid the amount claimed to the Government in payment of the demand above-mentioned, and that it is less than what is due from the plaintiff on that account. The lower Courts have held this defence to be insufficient. They think that he was not justified in applying in 1281 fasli profits which were due to plaintiff before that time, and without first calling on the plaintiff to pay his share of the Government demand: and that the proper course to be taken, was to have brought a suit against the [136] plaintiff for his share of the Government demand, in the event of his refusing to pay it on demand.

The opinion of the lower Courts is not well-founded in reason or equity. When the defendant was required to pay to the Government an amount for which the plaintiff was jointly responsible, the former had in his hands a balance remaining out of the collections of 1278, 1279, and 1280—a balance which, after payment of the Government revenue and village expenses, would have been divisible as profits among the co-sharers of the mahal. But it was no breach of trust or breach of duty on his part to use that balance in paying the demand of Government for the arrears of revenue ^{on}, _{or}, ⁱⁿ account of the six years previous

* Appeal under clause 10 of the Letters Patent No. 7 of 1875.

to 1278. There was nothing illegitimate in the course adopted by him ; and it seems unreasonable to insist that he should have paid to his co-sharers the profits which would doubtless otherwise have been due to them, and that he should have paid the demand of the Government out of his own pocket, and sued them for contribution. For the moneys claimed he has accounted most satisfactorily, and it may well be presumed that they were reserved during the years to which the suit refers for the purpose to which they have been applied.

The answer made to the suit being good and sufficient, the suit should have been dismissed. The appeal is therefore decreed by reversal of the lower Courts' decrees, with costs in all the Courts.

Spankie, J.—I am sorry that I cannot accept the proposed judgment of my honourable colleague.

The judgments of the lower Courts appear to me to be correct on the point regarding which I differ from Mr. Justice PEARSON. In the present case the order for payment of the enhanced jama had been made in 1278 fasli (Sept., 1870—Sept., 1871), but it had not been complied with by the appellant, the lambardar, until February and March 1874 ; and in case No 368, which is a similar one to case No. 369 now before me, the lambardar had not made his second payment until May, 1874—that is to say, not until after the institution of the suit. It is found in both cases that the defendant, appellant, had never called upon the plaintiffs to make good their quota of the enhanced jama from 1272 to 1278 fasli (Sept. 1864—Sept. 1871). Nor had he himself, as far as appears from [137] the record, ever paid their portion or any portion of the sum claimed by Government for those six years from his own pocket—the first payment made by him in this case being on the 27th October 1873, i.e., Katik 1281 fasli.

Now the plaintiff, respondent, claims profits on account of the years 1278, 1279, and 1280 fasli from the defendant, the lambardar, *i.e.*, whatever is due to him after payment of the Government revenue and village expenses. There is no dispute that his quota of the Government revenue on Mr. Currie's jama has been paid for those years, and what he claims is the profits of the three years, after deducting the Government revenue and village expenses. The accounts for each year should be closed and audited annually, and any sum remaining after the satisfaction of the Government jama and village expenses should be made over to the shareholders, and until distributed may be regarded as being in the hands of the lambardar in trust for the shareholders. He is not at liberty to appropriate them for any other particular purpose without authority from the shareholders. In these years 1278, 1279, and 1280 fasli the defendant, as lambardar, had not himself made any extra payment to Government. If he desired to make his co-sharers responsible for their quota of arrears of Government revenue which he had to pay, or expected that he might have to pay, he might have sued them for the amount under the Rent Act, or he should have taken such other steps, as the Civil Court or Revenue laws permitted him to take, for the recovery of the money, after he had been compelled to pay in 1281 fasli the difference between the jama of 1272 and that of 1278 fasli as settled by the Government. But he was not, in my judgment, at liberty to claim, in answer to this suit, from the plaintiff his share of the profits of 1278, 1279, and 1280 fasli, as a set-off (for it amounts to that), being his quota of the sum actually paid by the defendant on account of the revenue demanded by Government, and levied from him in 1281 fasli.

The Act under which the suit has been brought does not allow a set-off to be pleaded in any claim of this nature. The money which the plaintiff claims

in this suit as due to him was withheld by the defendant, appellant, before he had been compelled to make any payment on account of the enhanced [138] Government demand; and I do not think that the share for which the plaintiff may be responsible can be deducted in this suit from the amount of profits due to him on account of the three years for which he has instituted his claim. (The learned Judge then proceeded to determine the remaining pleas in appeal, but so much of the judgment, for the purposes of this report, is immaterial.)

The Senior Government Pleader (*Lala Juala Parshad*) for the Appellant:—The lumbardar can only deduct from the profits of a year the legitimate village expenses of that year. He is a trustee and agent for the co-sharers, and cannot dispose of the profits of a co-sharer accrued due to him without his consent. The respondent should bring a separate suit.

Pandit *Ajudhia Nath* (with him Babu *Oprokash Chandur*)—Multiplicity of suits is to be avoided. The respondent had the money in his hands, and paid it in satisfaction of the Government demand, which he was entitled to do. He should be allowed the payment.

Stuart, C. J., and Pearson, Turner, and Oldfield, JJ., concurred in the following opinion:—

It appears that Mr. Currie as Collector allowed a reduction of the yearly revenue, subject, it may be presumed, to the sanction of Government. In 1278 fasli sanction was refused, and a demand was made on the respondent, the lumbardar, who however did not pay the arrears due until 1281 fasli. Meanwhile he retained in his hands the profits of 1278 fasli, 1279 fasli, and 1280 fasli, and not improbably for the purpose of meeting the Government demand if pressed. In the suit out of which this appeal arises, the appellants, the patnidars, sue the lumbardar for their profits of the years 1278, 1279, and 1280; and he pleads that, out of the sums collected in these years and remaining in his hands, he has paid the arrears of revenue above-mentioned; and the question which principally calls for decision in this appeal is whether he is or is not entitled to be allowed this payment. We are of opinion that he is. The lumbardar is, in this village, the agent of the co-sharers to make collections, and after payment of the revenue to divide the profits. An arrear of revenue was due to Government, and to discharge this arrear he was entitled to have recourse to the collections for the years 1278 [139] fasli, 1279 fasli, and 1280 fasli, remaining in his hands undivided. There is nothing in the revenue law which restricts a lumbardar or other co-sharer, who may make collections, to discharge arrears of Government revenue out of the collections of the particular year in which the arrear may accrue. It would be at least inconvenient to hold that, having in his hands profits to meet the Government demand, the respondent, instead of applying these profits to the discharge of the demand, should be driven to have resort to a suit against each co-sharer.

Spankie, J.—I adhere to the opinion expressed in my judgment of the 8th June 1875. Nothing that I have heard leads me to think that my view is incorrect.

NOTES.

[See also 2 All. 336; 2 Mad. 38; 14 Bom. 331.]

[1 ALL. 139]

FULL BENCH.

The 19th February, 1876.

PRESENT :

SIR ROBERT STUART, K.T., CHIEF JUSTICE, MR. JUSTICE PEARSON,
 MR. JUSTICE TURNER, MR. JUSTICE SPANKIE,
 AND MR. JUSTICE OLDFIELD.

In the Matter of Hardeo.

Act X of 1872, s. 297—High Court—Powers of revision—Judgment of acquittal.

The High Court is not precluded by a judgment of acquittal from exercising its powers of revision under s. 297,* Act X of 1872. *Queen v. Bisheshar Pandey* (H. C. R., N.-W. P., 1874, p. 357) observed upon.

Per TURNER and SPANKIE, JJ.—Such powers can only be exercised where the judgment of acquittal has proceeded on an error of law and not where it has proceeded on an error of fact!

*[Sec.297 :—If, in any case either called for by itself or reported for orders, or which comes to its knowledge, it appears to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence, or order thereon as it thinks fit.

Power to order commitment. If it considers that an accused person has been improperly discharged, it may order him to be tried, or to be committed for trial;

If it considers that the charge has been inconveniently framed, and that the facts of the case show that the prisoner ought to have been convicted of an offence other than that of which he was convicted, it shall pass sentence for the offence of which he ought to have been convicted;

Provided that if the error in the charge appears materially to have misled and prejudiced the accused person in his defence, the High Court shall annul the conviction and remand the case to the Court below with an amended charge, and the Court below shall thereupon proceed as it had itself amended such charge.

Proviso to power of altering finding. If the High Court considers that any person convicted by a Magistrate has committed an offence not triable by such Magistrate, it may annul the trial and order a new trial before a competent Court.

Power to annul conviction. If it considers that the sentence passed on the accused person is one which cannot legally be passed for the offence of which the accused person has been convicted, or might have been legally convicted upon the facts of the case, it shall annul such sentence and pass a sentence in accordance with law.

If it considers that the sentence passed is too severe, it may pass any lesser sentence warranted by law; if it considers that the sentence is inadequate, it may pass a proper sentence.

The High Court may, whenever it thinks fit, order that the sentence, in any case coming before it as a Court of Revision, be suspended; and that any person imprisoned under such sentence be released on bail, if the offence for which such person has been imprisoned be bailable.

Suspension of sentence. Except as provided in sections three hundred and twenty-eight and three hundred and ninety-eight, no Court other than the High Court, shall alter any sentence or order of any subordinate Court except upon appeal by the parties concerned.

Powers of revision confined to High Court. No person has any right to be heard before any High Court, in the exercise of its powers

Optional with Court to hear parties. of revision, either personally or by agent, but the High Court may, if it thinks fit, hear such person either personally or by agent.]

† So held in a case of conviction—*Petition of Belilios*, 12 B. L. R. 249. As “to material error,” see 12 B. L. R., 253, foot-note.

HARDEO was tried by the Court of Session on a charge under s. 471 (using as genuine a forged document), Indian Penal Code, and was acquitted by that Court, in accordance with the opinion of the assessors, the Court remarking that, as there was "such a serious amount of doubt as to the offence charged and so little prospect of a substituted charge being established, the accused ought not to be convicted." An application was made to the High Court on behalf of the persons who had instituted proceedings against him praying that the record to the case might be called for, and a new trial ordered, on the ground that the facts [140] found by the Court of Session were sufficient to convict him of the offence charged against him.

The Court (STUART, C.J.) made the following reference to the Full Bench :- *

The question raised in this petition has already been determined in this Court in the case of *Queen v. Bisheshar Pandey* (I. C. R., N.-W. P., 1874, p. 357) before Mr. Justice TURNER, who was of opinion that we had no power to disturb an acquittal save on the appeal of Government, and that therefore, I presume, a private prosecutor could not apply for revision of a judgment of acquittal; and there is also a ruling by Mr. Justice MARKBY of the Calcutta Court (*Queen v. Hatu Khan*, 12 B. L. R., App. 22; s.c., 21 W. R. Cr., 21. See also Petition of Bagram, 19 W. R. Cr., 52; *Okhoy Teli v. Madhoo Sheik*, 19 W. R. Cr., 55) to the same effect. I am inclined to think that these learned Judges are right, but the question is not without difficulty and doubt.

On the other hand, the powers of revision by this Court under s. 297 of the Criminal Procedure Code are very large, literally unlimited, and there might be great hardship in preventing a private prosecutor from showing to this Court, in the way of revision that the facts and evidence relied on in defence afforded no answer whatever to the charge; and it might be argued to be impolitic and scarcely intended that, while the Government can not only appeal, but, according to the judgments above referred to, can also apply for revision - and in all cases - a private prosecutor has no remedy by resort to this Court against the ignorance, and it may be the corruption, of a local Magistrate or Judge exculpating and acquitting an offender against the Penal Code in the face of the clearest evidence and the undoubted facts, even where these facts are found by such Magistrate or Judge himself.

In the present case the private prosecutor pleads that "the facts found by the Sessions Judge were sufficient to convict the defendant under s. 471, if not of direct forgery." This is a question that appears to be covered by the terms of s. 297, and revision is not necessarily the same thing as an appeal. The object of s. 272 of the Criminal Procedure Code, which gives an appeal to Government against a judgment of acquittal, was [141] perhaps simply to allow the public prosecutor in such a case a re-hearing on the merits, without any desire to limit or curtail the powers of revision, whatever the extent of these may be. I refer the question to a Full Bench of the Court.

Mr. Howard, for petitioners, referred to *Queen v. Gora Chand Gopee* (1 Ind. Jur., N.S. 177; s.c., 5 W. R. Cr., 45).

Cur. adv. vult.

The following **Opinions** were delivered by the Full Bench :—

Pearson, J. - The question on which our opinion is asked I understand to be whether an acquittal precludes revision under s. 297, Act X of 1872; and my answer to the question is in the negative. The terms of that section empower the High Court in any case, either called for by itself or reported for orders,

or coming to its knowledge, in which it appears that there has been a material error in any judicial proceeding of any Court subordinate to it, to pass such judgment, sentence or order thereon as it thinks fit.

There is nothing in these terms restricting the High Court's action in the exercise of the powers conferred upon it to cases in which persons have been convicted of an offence. On the contrary, it seems to me that the High Court is fully warranted by these terms in ordering a new trial of a person who has been acquitted by reason of some material error in a judicial proceeding of a subordinate Court. The provisions of s. 272 of the Code are quite distinct from those of s. 297 and do not militate with them. Whether in the particular case out of which this reference to the Full Bench has arisen, there has been any such material error in the proceedings of the lower Court as to call for revision is another question which we are not asked to decide.

Turner, J.—In *Regina v. Bisheshar Pandey* (H. C. R., N.-W. P., 1874, p. 357) an application was made to me to admit for revision the proceedings in a Session trial, in which the Sessions Judge had acquitted a person accused of adultery on the ground that he was not satisfied which the evidence of his guilt and inclined to accept the evidence adduced by the accused in support of a plea of *alibi*, and the petitioner contended that the application ought to be admitted because the guilt of the [142] accused was proved by the admission of the woman who was at the same time on trial for abetment of the offence.

In refusing that application I inadvertently used language which warrants the conclusion that in no case of acquittal can this Court interfere as a Court of Revision. I am not prepared to maintain that view. Where there has been an acquittal on the merits, where an accused person has been acquitted because the Court by which he has been tried holds the evidence insufficient to prove his guilt beyond reasonable doubt, I am still of opinion that this Court cannot interfere as a Court of Revision. But where the acquittal has been brought about by a material error in the proceeding, and by material error I understand such an error as makes the proceeding bad in law, then I hold it is competent for this Court to interfere. Now it is not only not an error on the part of the Court, but it is the duty of the Court to determine whether evidence offered is in its judgment reliable or not. Consequently, although this Court might be disposed to give credit to evidence distrusted by a subordinate Court, it could not interfere on this ground as constituting a material error in a judicial proceeding. On the other hand, if the facts found by the subordinate Court constituted the offence charged, and through error of law the subordinate Court held that they did not constitute the offence, and therefore acquitted the accused, or if the subordinate Court improperly excluded relevant evidence, and consequently acquitted the accused, in both these cases I should hold that this Court had power to intervene as a Court of Revision.

It had been suggested that the first clause of s. 297 is controlled by the succeeding clauses. Although some of the cases mentioned in these clauses might be held to constitute material error in a judicial proceeding and so to fall within the purview of the first clause, I have already in other cases expressed my opinion that the first clause is not controlled by the succeeding clauses.

There remains the question whether, in the case referred, a private complainant may set the Court in motion. In my judgment in this as in other cases in which the Court has a discretionary power to call for cases for revision, it is competent to the Court to allow a private person to move it to exercise its powers.



[143] **Spankie, J.**—The prayer of the petition which gave rise to the reference is that the records of the case may be called for, and an order for a new trial be given—and the reason assigned for the prayer is that the facts found by the Sessions Judge were sufficient to convict the defendant under s. 471, if not of direct forgery.

I do not quite gather from the order of reference what we are asked to determine. If we are asked whether the Court could entertain the petition under s. 297 so far as to send for the record, I would say that it could be sent for if the petition discloses any material error in the proceedings of the Court below. But it seems to me that nothing of the kind is disclosed by the petition in the case brought to our notice. The petitioner expresses his opinion that the facts found on the evidence by the Sessions Judge were sufficient to convict the defendant—but no error or defect either in the charge or in the proceedings on or before trial, on account of the improper admission or rejection of any evidence, has been shown, whereby there has been a failure of justice affecting the due conduct of the prosecution. The proceedings of the Court have been regular, but the Judge on the evidence finds that the charge has not been established. He therefore acquits the prisoner. There is no appeal allowed by law to a private prosecutor from an order of acquittal—and in my opinion there is no power given to this Court to revise an order of acquittal on the facts found on the evidence. Any revision must proceed on the ground of a material error in some judicial proceeding. When no such errors such as those referred to above are pointed out, unless there is something that could be considered to be a material error in law, all interference under the first paragraph of s. 297 seems to be barred. It will further be observed that though were the material error is such that the Court is empowered to pass such judgment, sentence or order as it thinks fit, and though these words seem to be almost unlimited in their range, still there does appear to be some limit put to these cases in which a new trial may be ordered. When an accused person has been improperly discharged there is power to order commitment, there is power to alter a finding and sentence, and power to annul conviction, power to annul improper and to pass a proper sentence, and power in certain cases, of which this [144] before us is not one, to annul the trial and order a new trial before a competent Court. But there is no express power given to order a new trial in the case of an acquittal on the ground that the facts found might warrant conviction. From these considerations I come to the conclusion that, as there is no appeal to a private prosecutor in the case of an acquittal, so there can be no revision by the Court merely of the finding on the evidence, and if there is a revision at all, it must be on some purely material error (in law) in the proceedings.

Oldfield, J.—In my opinion it was not the intention of the legislature that the power of revision given to this Court by the first paragraph in s. 297, Criminal Procedure Code, to pass such judgment, or sentence or order as it thinks fit, when a material error in any judicial proceeding of a Court in any case has come to its knowledge, should only be exercised in the particular instances of error and in the particular manner given in the succeeding paragraph of s. 297. I apprehend that those paragraphs are merely illustrative of the operation of the law in particular instances, and that this Court can, and should, revise any material error in a judicial proceeding coming to its knowledge, by passing such judgment, sentence or order as it thinks fit.

In this view of the law the fact that an accused person has been acquitted on trial will not operate to take away the general power of revision, when there has been a material error in any judicial proceeding in the case. The law, by

S. 272, Criminal Procedure Code, allows the High Court to entertain an appeal from judgments of acquittal at the instance of the Local Government, and since it can interfere in cases of acquittal on appeal, I conclude it can *a fortiori* under its power of revision; and without such a power in this Court there would be danger of miscarriage of justice. Such too was the view of the law under the old Criminal Procedure Code taken in *Queen v. Gora Chand Gopee* (1 Ind. Jur., N. S., 177; S. C., 5 W. R. Cr., 45) by the Calcutta Court, PEACOCK, C. J., TREVOR and NORMAN, JJ.

I am not called upon to express an opinion whether there has been a material error in the case within the meaning of s. 297.

[146] Stuart, C.J.—This case has come back from the Full Bench with the opinions of the Judges, and it is now to be disposed of by me as the referring Judge.

The majority of the Court, including myself, hold generally that we have and may exercise in such a case as the present the revisional power conferred by the first general substantive enactment of s. 297 of the Criminal Procedure Code. Mr. Justice SPANKIE is of a different opinion, holding that, as there is no appeal to a private prosecutor in the case of an acquittal, there can be no revision as here claimed.

Some of my colleagues, however, do not appear fully to have apprehended my reference as I intended to put it, and if I could have anticipated their difficulty I would have endeavoured to have put the question referred in clearer terms than I have used. But, looking at the case in the light in which its mere statement would be at once understood by the legal profession at home, it did not occur to me to be more precise, but let me here explain myself more clearly by a brief reference to the opinions of my colleagues. Mr. Justice TURNER comes nearer my own views of the case in the sense I have alluded to, when he expresses himself favourably as regards our revisional power in all cases where there is error in law, adding that, "if the facts found by the subordinate Court constituted the offence charged, and through error of law the subordinate Court held that they did not constitute the offence, and consequently acquitted the accused, or if the subordinate Court improperly excluded relevant evidence, and consequently acquitted the accused, in both these cases I should hold that this Court had power to intervene as a Court of Revision"—his meaning, I presume, being that, if the subordinate Court acquitted from an ignorant conception of the legal insufficiency of the facts, this Court could interfere. On the other hand, PEARSON, SPANKIE, and OLDFIELD, JJ., although differing in opinion as to our powers of revision in cases of acquittal, do not appear to have considered that legal error or material error was shown in the reference, and that it had yet to be ascertained. Mr. Justice SPANKIE in such a case as this is against any revision on our part at all, while I suppose the meaning of the opinion of PEARSON [146] and OLDFIELD, JJ., is that we may send for the record and then see what the error, if any, was.

But there was a question preliminary to such an order which I intended should be first entertained and decided, *viz.*, whether the petition before us shows, *on the face of it*, a case which we can entertain at all, in other words, assuming the statement in the petition to be true, does it on its face show legal error? This is a question that lies on the threshold of the case, and must be first determined before we even admit the application, much more before we make any order for the record. The Sessions Judge acquitted the accused, and it is alleged by the petitioner that not merely the facts, but the facts found by the Sessions Judge himself, were sufficient to convict. Now does such a statement show, or does it not show, *on the face of it*, legal or material error? There

is here evidently the same question that is raised, the same legal or material error that is intended by, for example, the demurrer to an indictment at home, and legally demonstrated when well taken as a plea—for I think any one acquainted with the principle of the English demurrer in criminal pleading must perceive at once that the principle here sought to be applied is analogous.

Such was the reference I intended, and the question involved appeared to me to be a very simple one, and sufficient to raise the question and enable us to come to a decision as to the powers of revision given to High Courts in all cases. It was occasioned not only by the consideration I have given to the powers of this Court under the Criminal Procedure Code, but also by the judgments alluded to in my order of reference. No prosecutor other than the Government can appeal against a judgment of acquittal. This power, however, is expressly given to the Government by s. 272 of the Criminal Procedure Code. Such an appeal, I take it, is an appeal *on the merits* of the case, that is, an appeal on the ground that the trial in the Court below has miscarried by the reason of the Judge or Magistrate not having sufficiently weighed or considered the evidence, and that there has been an acquittal, whereas there ought to have been a conviction. Such is the appeal which in the case of an acquittal the Government can make. A private prosecutor, however, has no such power.

[147] But, although a private prosecutor has no such power of appeal against a judgment of acquittal on the merits, can he apply to this Court for revision under s. 297 of the Criminal Procedure Code; or, in other words, is insufficiency of facts to support a conviction such a legal error, on the face of the acquitting judgment, or otherwise such a revisional question, as can be entertained under s. 297?

In the Calcutta case above referred to, *Queen v. Hatu Khan* (12 B. L. R., App. 22) it was stated that the Deputy Magistrate, after hearing two of the prosecutor's witnesses only, and without taking the evidence of the remaining witnesses named by the prosecutor (two of them at least were present at the trial), and without examining the prosecutor himself in the presence of the accused, passed a judgment of acquittal under s. 211 of the Indian Penal Code. The Magistrate, however, being of opinion that such a judgment was illegal, reported the case for orders to the High Court of Calcutta, and it came on for hearing before MARKBY and BIRCH, JJ., the judgment of the Court being delivered by Mr. Justice MARKBY, who said: "We do not think that we have power to do what the Officiating Magistrate asks, namely, to set aside the acquittal of the prisoner, and to direct a retrial. The proceedings of the Deputy Magistrate were undoubtedly illegal, but they have resulted in the acquittal of the prisoner, and we are not empowered by the Criminal Procedure Code to interfere when a prisoner has been improperly acquitted. If a prisoner has been improperly discharged, we may order him to be tried, or to be committed for trial, under the second clause of s. 297. If the Legislature had also intended us to interfere when the prisoner was acquitted, it would undoubtedly have been so expressed in that case." The case (H. C. R., N.-W. P., 1874, p. 357) which came before Mr. Justice TURNER in this Court is scarcely in point. It was one in which the Sessions Judge had acquitted the prisoner, one Bisheshar Pandey, who was charged under s. 497, Indian Penal Code (adultery), and 498 (enticing, or taking away or detaining with a criminal intent, a married woman), and two other persons, Balak and Mussamut Bhagia, of abetment of the offences, and the private prosecutor presented a petition to this Court in which it was objected that "the acquittal was bad in law, the statement of **[148]** Mussamut Bhagia being sufficient to establish the offences charged

against the accused." Such an objection scarcely shows an error in law. It would rather appear to have been an error or mistake on the part of the Judge in not giving due effect to the evidence, and that therefore the petition was really an appeal on the merits, which of course could not be entertained. But the petition was entitled in revision, and it suggested that the acquittal was "bad in law" for the reasons stated, and the case was argued before my learned colleague as one in revision, the counsel who appeared against the petition referring to the judgment of Mr. Justice MARKBY in the Calcutta case (12 B. L. R., App. 22). In the order passed by Mr. Justice TURNER it was stated that the reasons for the acquittal were not obvious, and it then proceeded :— "However, there has been an acquittal, and, as the learned counsel who appears for the accused in this Court contends, this Court has no power to disturb an acquittal save on the appeal of Government. The provisions of s. 297 only permit the Court to interfere and order a new trial when an accused person has been discharged without being put on his trial." The judgment of my honourable and learned colleague is so reported, but from the opinion he has recorded in the present case I am glad not to be driven to the conclusion that he necessarily holds against our power to revise.

Respecting, however, the opinion I have quoted of Mr. Justice TURNER and the judgment of Mr. Justice MARKBY in the Calcutta case (12 B. L. R., App. 22) I stated in my order of reference that I was inclined to think that these learned Judges were right, but that the question was not without difficulty and doubt, suggesting at the same time considerations in favour of the remedy sought in the case before us. I pointed out that "the powers of revision by this Court under s. 297 of the Criminal Procedure Code are very large, literally unlimited, and there might be great hardship in preventing a private prosecutor from showing to this Court, in the way of *revision*, that the facts and evidence relied on in defence afforded no answer whatever to the charge; and it might be argued to be impolitic and scarcely intended that, while the Government cannot only *appeal*, but, according to the judgments above referred to, can also apply for revision—and in all cases—a private pro-
[149]secutor has no remedy by resort to this Court against the ignorance, and it may be the corruption, of a local Magistrate or Judge exculpating and acquitting an offender against the Penal Code in the face of the clearest evidence and the undoubted facts, even where these facts are found by such Magistrate or Judge himself," and that the right to present such a petition "appears to be covered by the terms of s. 297 and revision is not necessarily the same thing as an appeal. The object of s. 272 of the Criminal Procedure Code, which gives an appeal to Government against a judgment of acquittal, was perhaps simply to allow the public prosecutor in such a case a re-hearing on the merits, without any desire to limit or curtail the powers of revision whatever the extent of those may be." And having now fully considered the question, I have formed the opinion very clearly, first that a private prosecutor who can show on the face of his petition a proper case for revision of a judgment of acquittal is entitled to have it entertained under s. 297 of the Criminal Procedure Code and to an order on it for a new trial, or otherwise as to this Court in such a case might seem proper, and secondly that, inasmuch as the petition in the present case states that the facts found by the Sessions Judge were sufficient to convict, the petition was a petition in revision which the private prosecutor was entitled to present, and that her prayer that the records of the case be called for in order to consider the suggestion for a new trial should be granted.

So far, therefore, I must qualify the concurrence I expressed in favour of the ruling, at least, of Mr. Justice MARKBY (12 B. L. R. App. 22). According to the

report of the procedure in the lower Court in the case before that learned Judge and Mr. Justice BIRCH, I think they ought to have entertained the application and to have ordered a new trial; and I am clearly of opinion that the High Court has the power which these Judges appear to repudiate. In the other case in this Court my learned colleague Mr. Justice TURNER appears to have considered, and, as I have already observed, correctly, that the case before him was really one of appeal on the evidence; but when he goes on to state that "the provisions of s. 297 only permit the Court to interfere and order a [150] new trial when an accused person has been discharged without being put on his trial," I must remark that it does not necessarily follow that there is no course open to a private prosecutor, or for that matter to any prosecutor, public or private, under s. 297, who complains of an illegal acquittal after trial.

But there is a question of considerable importance which was referred to at the hearing of this case, and as I have formed an opinion of my own on the subject, I desire to express it. The question is this, whether the first substantive portion of s. 297 is complete in itself, giving the High Court the full general powers of revision thereby appearing to be conferred, and that the paragraphs which follow this general portion of the section are to be considered merely as examples or illustrations in the way of expressed enactment, or whether the first part of this section is to be considered as merely introductory to the particular provisions which follow in the succeeding enactments, and that these particular provisions contain all the powers given to the High Court? Now, on this subject, I am clearly of opinion that the first part of s. 297 is not merely introductory to the particular enactments which follow, but that it is, on the contrary, a substantive and complete enactment in itself, without any necessary reference to the clauses which follow; and of course the powers thus given to the High Court are large and full, if not unlimited.

It occurs to me to add that, in my opinion, s. 272 giving the Government the power of appeal against a judgment of acquittal did not affect or interfere with, much less take away, any rights or remedies competent to prosecutors, public or private, under s. 297—that s. 272 was simply an addition to the provisions of the Code of Criminal Procedure, and that before it was passed prosecutors could avail themselves of the revisional powers of this Court, whether in the case of acquittal, or otherwise, and that they can do so still.

As regards, therefore, the question of our powers in the case before us and the sufficiency of that case in law, I am of opinion that the petition ought to be admitted and entertained, and I admit it accordingly as an application that may be entertained and disposed of under s. 297 of the Criminal Procedure Code, and I direct the records to be sent for and notice to issue to the other side.

[151] FULL BENCH.

The 16th February, 1876.

PRESENT :

SIR ROBERT STUART, K.T., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, MR. JUSTICE SPANKIE, AND
MR. JUSTICE OLDFIELD.

Queen

versus

Thakur Parshad.

Act X of 1872, s. 390—Convicted person—Bail—Sessions Court.

The Court of Session has no power, under s. 390, Act X of 1872, to admit a convicted person to bail,* a *convicted person* not being an *accused person* within the meaning of that section.

THIS was a reference to the Full Bench by STUART, C.J., arising out of the following facts :—

The Magistrate trying an offence mentioned in s. 222, Act X of 1872, in a summary way, sentenced the offenders, on conviction, to one month's rigorous imprisonment each. There was no appeal in the case under the provisions of ss. 273, 274, Act X of 1872. On the application of the convicted persons the Court of Session called for the record of the case, under the provisions of s. 296 of that Act, and at the same time directed the Magistrate to admit them to bail pending its decision as to the legality of their conviction. This order purported to be made under s. 390,† Act X of 1872. The receipt of the order by the Magistrate gave rise to certain correspondence, which it is immaterial for the purposes of this report to notice, between that officer and the Court of Session as to the legality of the order. This correspondence the Court of Session submitted to the High Court for orders.

The main question involved in the reference to the Full Bench was whether the Court of Session was competent to make the order directing the admission of the convicted persons to bail under s. 390, Act X of 1872.

The order of reference by STUART, C.J., so far as it is material for the purposes of this report, was as follows :—

That section (390) provides that “the Court of Session may in any case, whether there be an appeal on conviction or not, direct [152] that the accused person shall be admitted to bail, or that the bail required by a Magistrate be reduced.” This, it was argued, meant “whether there be *allowed by law* an appeal on conviction or *not allowed by law*.” In connection with this view,

* So held by GLOVER and ROMESH CHUNDER MITTER, JJ., in *Queen v. Ram Rutton Mookerjee*, 24 W. R. Cr. 8, and in *Queen v. Kanhai Shahi*, 23 W. R. Cr., at p. 42. See also *Queen v. Malendranarayan Bangabhusan*, 1 B. L. R. A. Cr. 7, in which LOCH and GLOVER, JJ., held that, under s. 436, Act XXV of 1861, the law then in force, in which the term *accused person* was also used, the Court of Session had no power to admit a *convicted person* to bail.

† [Sec. 390 :—The Court of Session may in any case, whether there be an appeal on conviction or not, direct that an accused person shall be admitted to bail, or that the bail required by a Magistrate be reduced.]

however, it must be remembered that the Sessions Judge has no power under s. 297 of the Code of Criminal Procedure, or otherwise, to revise the proceedings of Criminal Courts subordinate to him, and that, in the case of an appeal not allowed by law, an application to him to admit to bail would be unmeaning and futile. If, on the other hand, the true meaning of the section is "whether there be an appeal *entered or taken* on conviction, or *not entered or taken*," then the power of the Judge would appear to be confined to appealable convictions, and not to extend to cases, like the present, where there is no appeal, the Judge at the same time having no power of revision.

Mr. Raikes for the convicted persons.—The terms of s. 390 are purposely large. [TURNER, J.—It seems to me that the use of the words "accused person" in the section is sufficient to show that the Court of Session cannot admit a "convicted person" to bail under it.] The terms are synonymous, the words "accused person" are used in the sense of "convicted person" in ss. 283,* 297, of the Code. Section 281¹ and s. 390 must be read together. The first gives the Court of Session as an appellate Court power to admit to bail, the second gives it a general power. [TURNER, J. - If s. 390 gives the Court of Session a general power, s. 281 appears unnecessary as far as that Court is concerned.]

[OLDFIELD, J. Your construction of s. 390 gives the Court of Session a greater power than the High Court as a Court of Revision possesses.] The section refers to cases where the Court of Session is proceeding under s. 296. Suppose this case had not been tried in this district but in a remote district, and the Court of Session had determined to report the case for the orders of the High Court, being satisfied that the conviction was illegal. In such a case it would be most desirable for the Court of Session to have the power of admitting the convicted persons to bail, pending the orders of the High Court. [PEARSON, J., referred to the heading of Part ix of the Code.]

Cur. adv. ruli.

[153] The following **Opinions** were delivered by the Full Bench :—

Pearson, J. - The question upon which I understand that the opinion of the Full Bench is required is whether the Court of Session at Allahabad was warranted by the terms of s. 390, Act X of 1872, in directing the Magistrate to admit to bail a person who had been convicted and sentenced to one month's imprisonment under s. 352, Indian Penal Code. My answer to that question

* [Sec. 283.—No finding or sentence passed by a Court of competent jurisdiction shall be reversed or altered on appeal on account of any error or defect,

Finding or sentence when either in the charge or in the proceedings on or before trial, or reversible by reason of on account of the improper admission or rejection of any evidence, error or defect in charge, or by any misdirection in any charge to a jury, unless such or proceedings.

affecting the due conduct of the prosecution, or by prejudicing the prisoner in his defence. No irregularity in the proceedings up to trial is a sufficient ground for reversing any judgment, sentence or order made or passed in a trial properly held.

In case the accused person has been sentenced to a larger amount of punishment than could have been awarded for the offence, which, in the judgment

Appellate Court may of the Appellate Court, is proved by the evidence, the Appellate Court may reduce the punishment within the limits prescribed by the Indian Penal Code or any law for the time being in force

for such offence.]

* [Sec. 281: In any case, in which an appeal is allowed, the Appellate Court may, pending the appeal, order that the sentence be suspended, and if the appellant be in confinement for an offence which is bailable, may order that he be released on bail. The period during which the sentence is suspended shall be omitted in reckoning the completion of the punishment.]

is in the negative. Section 390 declares that "the Court of Session may in any case, whether there be an appeal on conviction or not, direct that an *accused* person shall be admitted to bail." The section occurs in a part of the Code which prescribes procedure incidental to enquiry and trial; and it is thus evident that an accused person is one against whom an accusation is the subject of inquiry and trial and not a *convicted* person. That this is so further appears from the context, if s. 390 be read in connection with the preceding and following section. By "any case" is meant only any case the subject of enquiry or trial before a Magistrate, whether or not, in the event of a conviction, an appeal would lie from the Magistrate's sentence or not. The section does not refer to cases in which the Court of Session is proceeding under s. 296 of the Procedure Code.

Turner, J.—Reading the terms of s. 390 by themselves, the natural construction appears to be that in all cases, both in those which, resulting in a conviction, would not be appealable to the Sessions Judge, and in those which, resulting in a conviction, would be so appealable, a Court of Session has power to admit to bail an accused person, that is to say, a person charged, but not as yet convicted of an offence, or to reduce the bail required by a Magistrate.

It may be dangerous to draw an inference as to the proper construction of this section from the place it occupies in the Code, because at the conclusion of the chapter we find s. 399 applying to all cases in which bail may be taken except those therein specially excepted. The proper construction of s. 190 rests on the meaning to be given to the word "accused." In its ordinary sense it is most properly applied to persons against whom a charge is made, and it is opposed to the term "convicted." But the learned counsel for the petitioner contends that, in other parts of the Code, we find the [154] term "accused" applied to persons convicted—to which it appears a reasonable answer that, in those places, as for instance in ss. 283 and 297, it is apparent from the context that the term is used in a particular sense, whereas in s. 390 there is nothing in the context to affect its ordinary meaning. It must, therefore, be held that the provisions of s. 390 do not empower the Sessions Judge to order the Magistrate to admit to bail a person who has been convicted. Of course, as an appellate Court, a Sessions Judge has power on or after the admission of the appeal to admit the convicted appellant to bail, but in the case out of which this reference has arisen no appeal lay to the Sessions Court.

Spankie, J.—On the question as to the legality of the order, there can be no doubt, I think, that, if made under s. 390 of the Criminal Procedure Code, it was illegal. The section is found in Part ix of the Code, which refers to procedure incidental to inquiry and trial. Section 388² directs when bail shall be taken when any person is accused before a Magistrate: s. 389¹ directs when it

* [Sec. 388:—When any person appears or is brought before a Magistrate accused of any bailable offence, he shall be admitted to bail.]

† [Sec. 389:—When any person, accused of any non-bailable offence, appears or is brought before a Magistrate, such person shall not be admitted to bail, if there appear reasonable grounds for believing that he has been guilty of the offence of which he is accused.

If the evidence, given in support of the accusation, is, in the opinion of the Magistrate, not such as to raise a strong presumption of the guilt of the accused person, or if such evidence is adduced on behalf of the accused person as, in the opinion of the Magistrate, weakens the presumption of his guilt, but there appears to the Magistrate

in either of such cases to be sufficient ground for further inquiry into his guilt, the accused person shall be admitted to bail pending such inquiry.]

shall not be taken in non-bailable offences, and when it may be taken. Under those sections it is the Magistrate who orders bail. Section 390 empowers the Sessions Court in any case, whether appealable to itself or not so appealable, either to admit to trial or to reduce the amount of bail ordered by the Magistrate. But the power given is to be exercised before conviction is had, and it may be exercised in all cases and without exception.

Oldfield, J.—The Judge's order directing the Magistrate to release the prisoners on bail is, in my opinion, illegal. The case not being appealable, the Judge could not act under s. 281, Criminal Procedure Code, as an appellate Court and admit to bail, and the power given by s. 390, Criminal Procedure Code, appears to me to refer to the procedure incidental to inquiry and trial, and to allow the Judge in any case to admit an accused person to bail at any time during the trial, but not after conviction. Section 390 should be read with the preceding section.

To interpret s. 390 so as to permit the Judge to take bail without restriction, in any case after conviction, would be to allow the Judge a higher power in admitting to bail than is given to the High Court as a Court of Revision, since s. 297, Criminal Procedure [188] Code, limits that Court's power to take bail in cases coming before it as a Court of Revision to cases where the offence for which a person has been imprisoned is bailable.

Stuart, C.J.—This reference has come back to me from the Full Bench with the opinions of the consulted Judges. They all consider that the Judge's order, purporting to direct the Assistant Magistrate to release the prisoners on bail, was illegal, and I am clearly of the same opinion. They very properly direct attention to the circumstance that s. 390 is to be found under Part ix of the Code, which is entitled as "Procedure incidental to inquiry and trial"; and, keeping that consideration in view in construing the section, I am of opinion that it only applies to the case of an "accused person," that is, to the case of a person accused of an offence, the conviction of which is appealable or not appealable, and that it was not intended to apply to such a case as the present, where there has been a conviction, final and complete. Such, I think, is the true meaning of the section. Any other reading of it, which would take it out of the category indicated by the heading of "Procedure incidental to inquiry and trial," would involve the necessity of holding that an "accused person" in the section was synonymous with a convicted person, and that therefore the compiler of the Code had made a mistake in placing it under the heading of "Procedure incidental to inquiry and trial." The Sessions Judge, I think, must be understood to be of this mistaken opinion, for it appears from the correspondence which accompanies his letter of reference and by his directing Mr. Pears' attention to s. 390 of the Criminal Procedure Code, that his idea was that he could admit to bail in *any case after trial*, whether there had been a conviction or not. We cannot, however, put such a construction on the terms of the section, a construction entirely repugnant to them and to the whole context. "An accused person" simply means an accused person, and nothing more, and this s. 390 was only intended for a person in that position, and who on conviction would appeal or not.

But in either view of the section the Judge's order in the present case ought not to have been made. If s. 390 does not apply, as I hold it does not, there is no other provision of the Code which [188] empowered the Sessions Judge to admit to bail, and the order was altogether *ultra vires*. But if, on the other hand, it could be shown that the section does apply to such a case as this, the order was equally invalid, for (as I have already pointed out in my referring

order) the Judge having no revisional authority, his admitting these convicts to bail was inoperative for any judicial purpose or effect and therefore futile.

NOTES.

【See also 17 Bom. 334.】

【1 All. 156】

APPELLATE CIVIL. .

The 13th March, 1876.

PRESENT:

MR. JUSTICE SPANKIE AND MR. JUSTICE OLDFIELD.

Hussaini Bibi.....Defendant

versus

Mohsin Khan.....Plaintiff.

Act VIII of 1859, s. 327--Arbitration--Award--Appeal.

The plaintiff sought to file and to enforce a private award, under the provisions of s. 327, Act VIII of 1859. The defendant objected that he was no party to the award. The Court to which the plaintiff's application was made, after inquiry into the matter, overruled the objection, and directed that the award should be filed, but made no decree enforcing the award under the provisions of ch. vi, Act VIII of 1859. Held, that the order was not open to appeal as it did not operate as a decree.* *Jokhur Rai v. Bucho Rai* † followed.

Per SPANKIE, J.—Section 327 † intended to provide for those cases only in which the reference to arbitration is admitted and an award has been made. Where the defendant denies referring any dispute to arbitration or that an award has been made between himself and the plaintiff, sufficient cause is shown why the award should not be filed. The plaintiff should be left to bring a regular suit for the enforcement of the award.

* *Contra* see *Lakshman Shiraji v. Rama Esu*, 8 Bom. H. R. Rep., A. C. 17. As to whether an appeal lies from a decree enforcing the award, see *Sashti Charan Chatterjee v. Tarak Chandra Chatterjee*, 8 B. L. R., 315; S.C., 15 W. R., F. B., 9.

† H. C. R., N.-W. P., 1868, p. 353.—The Court also held in that case that the order rejecting an application for the filing of an award was not appealable. The Calcutta High Court has also held so—see *Chintamani Singh v. Roopa Koser*, 6 W. R., M. 83; *Dyamburee Dasset v. Poornanund Dey*, 7 W. R., 401; *Raj Kumar Singh v. Kali Charan Singh*, 2 B. L. R., App. 20; S.C. 11 W. R., 58; *Roy Priyanath Chowdhury v. Prasana Chandra Roy Chowdhury*, 2 B. L. B. 249. So also the Bombay High Court—see *Vrankatish Ramchandra Jogekar v. Balajeerao*, 1 Bom. H. C. Rep., 184; *Petition of Balkrishna Bhaskar Gupte*, 2 Bom. H. C. Rep., 96.

【See. 327 :—When any matter has been referred to arbitration without the intervention of any Court of Justice, and an award has been made, any person interested in the award may within six months from the date of the award make application to the Court having jurisdiction in the matter to which the award relates, that the award be filed in Court. The Court shall direct notice to be given to the parties to the arbitration other than the applicant, requiring such

Filing in Court an award when the matter was referred to arbitration without intervention of Court.
parties to show cause, within a time to be specified, why the award should not be filed. The application shall be written on the stamp paper required for petitions to the Court where a stamp is required for petitions by any law for the time being in force, and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. If no sufficient cause be shown against the award, the award shall be filed and may be enforced as an award made under the provisions of this chapter.]

Enforcement of such award.

IN this case there had been a reference to arbitration without the intervention of a Court, and an award had been made. The plaintiff applied under s. 327, Act VIII of 1859, that the award [187] might be filed in Court and enforced. The original defendant, who was represented after his death by his widow, denied referring the matter decided by the award to arbitration, or giving his consent to the reference, or that he had any knowledge of the arbitration proceedings.

The first Court framed the following issue for determination, *viz.*, "Whether the agreement to refer was made by an agent of the original defendant duly empowered in that behalf with the original defendant's knowledge and consent, and the award made in pursuance of that agreement should be enforced or not. After taking evidence both oral and documentary, it decided that the reference was made by an authorised agent of the original defendant, with his knowledge and consent and that the award must be filed. It concluded its decision in these terms":—I therefore decree the plaintiff's claim to file the arbitration award under s. 327, Act VIII of 1859, with costs and interest at six per cent., to be paid by the answering defendant.

The defendant appealed, taking the same objections to the plaintiff's claim as were taken in the first Court. The lower Court of Appeal relying on the case of *Jokhun Rai v. Bucho Rai* (H. C. R., N.-W. P., 1868, p. 353) held that there was no appeal.

Against this decision the defendant filed a special appeal to the High Court.

Mr. Mahmood (with him Mr. Conlan), for the appellant, contended that the order of the first Court was appealable. It is unjust and inexpedient that the judgment of the first Court deciding that the original defendant was a party to the award should be final. He referred to *Sushti Charan Chatterjee v. Turak Chandra Chatterjee* (8 B. L. R., 315; S.C., 15 W. R., F. B. 9), and *Hurlodhar Sungiree v. Ganesh Sauthal* (6 W. R., 60).

Mr. Colvin (with him Munshi *Hanuman Parshad*), for the respondent, contended that there was no appeal. He referred to *Jokhun Rai v. Bucho Rai*, (H. C. R., N.-W. P., 1868, p. 353), *Bhuwan v. Purushree* (H. C. R., N.-W. P., 1873, p. 179), and *Surboree Kanto Bhattacharjee v. Anadya Kanto Bhattacharjee* (12 B. L. R., App. 10).

[158] **Spankie, J.**—The prayer of the plaintiff in this case was to be allowed to file a private award of arbitrators in Court and for the enforcement of the award. The defendant (since deceased) denied that he had authorised his agent to refer any matter to arbitration and repudiated the whole transaction. The Munshi after going into the merits admitted the award in the following terms:—"I therefore decree the plaintiff's claim to file the arbitration award under s. 327, Civil Procedure Code, with costs and interest at 6 per cent. to be paid by the answering defendant (the widow of the original defendant deceased)." It does not appear that he made any decree enforcing the award under the provisions of ch. vi. of the Act.

The defendant appealed. The Subordinate Judge treating the order as a judgment under s. 325 of Act VIII of 1859 held that it was final, and that there was no appeal. The Subordinate Judge cites as his authority the Full Bench decision of this Court in the case of *Jokhun Rai* (H. C. R., N.-W. P., 1868, p. 353) and others, appellants.

It is contended in special appeal that as it was urged in both the lower Courts that the original defendant was no party to the award, the Subordinate Judge was bound to determine whether this was so or not.

For respondents the Full Bench ruling of this Court (H. C. R., N.-W. P., 1868, p. 353) and other precedents of the Presidency Court are cited as ruling that there was no appeal.

I am of opinion that we are bound by the decision of the Full Bench of this Court (H. C. R., N.-W. P. 1868, p. 353), and that we must hold that there is no appeal from the order of the Munsif allowing an award to be filed. At the same time, it appears to me that s. 327 intended to provide for those cases only in which a reference to arbitration is admitted, and in which an award has been made. Where one of the parties denies that he had referred any dispute to arbitration, or that an award had been made between himself and the other party, it seems to me that sufficient cause has been shown why the award should not be filed. The applicant for its admission should be left to bring a regular suit for the enforcement of the award. [159] Such, I may add, would appear to be the opinion of the dissenting Judge in one case decided by the Full Bench of the Presidency Court on the 23rd May 1871 (8 B. L. R., 315); s.c. 15 W. R., F. B. 9. Two of the other Judges in that case expressed opinions to the same effect.) But the Full Bench judgment of this Court (H. C. R., N.-W. P., 1868, p. 353) must, I think, be followed by us as being applicable to this case, and I would therefore dismiss this appeal with costs.

Oldfield, J.—I concur in dismissing the appeal with costs. I think we are bound by the Full Bench ruling of this Court (H. C. R., N.-W. P., 1868, p. 353), and must hold that the order of the Munsiff under s. 327, Act VIII of 1859, for filing the award, does not operate as a decree, and is not appealable.

NOTES.

[The judgment of SPANKIE, J., in (1881) 3 All. 427 gives an explanation of the ruling here. See also (1894) 17 A.H. 21; and note the changes in the C. P. C. of 1908.]

[7 All. 159]

FULL BENCH.

The 30th April, 1876.

PRESENT :

SIR ROBERT STUART, Kt., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, AND MR. JUSTICE OLDFIELD.

Kali Parshad.....Plaintiff

versus

Ram Charan.....Defendant.

Hindu Law—Undivided Hindu family—Ancestral immoveable property—Partition.

In an undivided Hindu family the son has, under the Mitakshara, a right to demand in the lifetime, and against the will, of his father, the partition and possession of his share in the ancestral immoveable property of the family.

THE facts of the case, so far as they are material for the purposes of this report, were as follows :—

The plaintiff, his father the defendant, and his brother, Lachman Parshad, were members of an undivided Hindu family. The plaintiff claimed to establish his right to a one-third share of certain shares in certain villages forming the ancestral immoveable property of the family, and to obtain possession of the same. He alleged that he was excluded from inheritance, inasmuch as the defendant, describing him as an outcast, had made over possession of a portion of the property to Lachman Parshad and a portion to the wife of a deceased son. The defendant pleaded that, under Hindu Law, such a claim by a son in the lifetime of his father was invalid. The Court of First Instance overruled this plea and gave the plaintiff a decree. The lower Appellate Court held that the plaintiff was only entitled, under Hindu Law, to a one-fourth share of the [160] ancestral property, and that possession of the share could not be given to him in his father's lifetime (*see* p. 162, note 5).

The plaintiff appealed to the High Court on the ground that, under Hindu Law, he was entitled to a one-third share of the property, and to possession of it.

The Court (STUART, C.J., and OLDFIELD, J.) referred the following question to a Full Bench, *viz* :—

“ Whether, under Hindu Law, as prevailing in this part of India, a son can obtain possession by enforcing a partition of his share in immoveable ancestral property during his father's lifetime and against his father's wish, and under what circumstances.”

The learned Judges referred to the following authorities :—*Deo Bunsee Koor v. Dwarkanath* (10 W. R., 273); *Ramchandra Dada Naik v. Dada Mahadeo Naik* (1 Bom. H. C. Rep., 2nd ed., App. 76); and *Nagalinga Mudali v. Subbiramaniya Mudali* (1 Mad. H. C. Rep., 77).

The Senior Government Pleader (*Lala Juala Parshad*), for the appellant, cited *Mitakshara*, ch. i, s. 1, v. 27, and ch. i, s. 5; *Goor Surun Doss v. Ram Surun Bhukut* (5 W. R., 54); *Ber Kishore Suhye Singh v. Hur Ballub Narain Singh* (7 W. R., 502); *Raja Ram Tewary v. Lachman Parshad* (8 W. R., 15; S.C., B. L. R., Sup. Vol. 731).

Lala Lalta Parshad, for the respondent, contended that the law, under the *Mitakshara*, relating to the partition of property, whether ancestral or acquired, was laid down in ch. i, s. 2. Partition is at the will of the father if alive. Section 5 does not relate to partition. He cited *Menu* ch. ix, v. 104, referred to in Strange's Hindu Law, 2 ed., ch. 9, p. 179.

The Opinion of the Full Bench was as follows :—

The answer to the question referred to us is, it appears to us, supplied by express texts of the *Mitakshara*. The fifth section of the first chapter of that work treats of the rights of father and son in property ancestral, and in the fifth paragraph the author declares that for or because the right is equal or alike, therefore partition is not restricted to be made by the father's choice; and having explained [161] in the seventh paragraph that the texts which he had discussed in the second section referred to property which had been acquired by the father himself, in the eighth paragraph he distinctly announces the rule in the following terms :—“ Thus, while the mother is capable of bearing more sons, and the father retains his worldly affections and does not desire partition, a distribution of the grandfather's estate does nevertheless take place by the will of the son.” In the ninth and tenth paragraphs he treats of the son's right of interference in the father's dealings with ancestral property as the consequence of their

indiscriminate right, and in the eleventh paragraph, in support of his position that "the father, however reluctant, must divide with his sons, at their pleasure, the effects acquired by the paternal grandfather," he deduces the authority of Menu from the text—"If the father recover paternal wealth not recovered by his co-heirs, he shall not, *unless willing*, share it with his sons, for in fact it was acquired by him." In which text the nature of the father's interest in the property so recovered is declared to be the same as would have been the interest of any one member of a joint family in such property so recovered, that is to say, he would have the right to treat it as his own.

The author of the *Mitakshara* himself reconciles what seeming discrepancy there may be between the rules as to partition expounded in s. 2 and the rules expounded in s. 5 by the statement that the texts cited in the former section refer to the father's property, and not to the ancestral property.

In the *Vyavahara Mayukha*, ch. iv, s. 4, v. 4, it is declared that the unqualified right of the sons to insist on the partition of ancestral property against the father's will has also the sanction of Brhaspati :—"The father and sons are equal sharers in houses and lands derived regularly from ancestors, but sons are not worthy (in their own right) of a share in wealth acquired by the father himself, when the father is unwilling."—"From which," says the author, "it results that sons are worthy of a share in property acquired by the grandfather or other (ancestor), even though the father do not wish it."

Seeing that the language of the *Mitakshara* is free from reasonable doubt, and that in cases governed by the *Mitakshara* the right [162] of the son to demand partition *invito patre* has been recognized in *Beer Kishore Suhye Singh v. Hur Bullub Narain Singh* (7 W. R., 502); *Raja Itam Tewary v. Lachmuni Pershad* (8 W. R., 15; s.c., B. L. R., Sup. Vol., 731); *Deo Bunsee Kooer v. Dwarkanath* (10 W. R., 273); *Nagalinga Mudali v. Subbiramanya Mudali* (1 Mad. H. C. Rep., 77; also in *Laljeet Singh v. Rajcoomar Singh*, 12 B. L. R., 373), and that if there be no reported cases in this Court it has been accepted hitherto as well established law in this Court, we would answer that, in the case of ancestral immoveable property, the son has, under the *Mitakshara* law, an unqualified right to demand partition. It is unnecessary for us in the present reference to express an opinion whether the same rule applies to ancestral moveable property.

NOTES.

[In the Full Bench case of (1891) 16 Bom. 29 the son's right to obtain a partition as against the father and uncles was considered with reference to the Satara District; See also 10 Bom 570; 31 Cal. 111; 28 Bom. 213. In 5 Cal. 148 the Privy Council stated in general terms the rights of coparceners as regards alienation.]

*With regard to the plaintiff's share, under Hindu law, in the ancestral immoveable property, and to the question of possession, the Division Court (STURAT, C.J., and OLDFIELD, J.), when the case was returned to it, in delivering judgment, said :— "There appears to us to be no doubt that the Judge (lower Appellate Court) has erred, the extent of the share in ancestral property to which a son is entitled being equal to that of the father, and he is entitled to such equal share at partition—*Mitakshara*, ch. i, s. 5, v. 3, and other texts. In the present case the family interested in the partition consisted of the father and two sons, each of these three being entitled to one-third of the ancestral estate, and that is the extent of the share for which the plaintiff is entitled to a decree in this suit.....

[1 ALL. 162]

CRIMINAL JURISDICTION.

The 21st April, 1876.

PRESENT :

SIR ROBERT STUART, K.T., CHIEF JUSTICE.

Queen
versus
 Jagat Mal.

Act X of 1872, ss. 468, 471, 473—Offence against public justice—Offence in contempt of Court—Prosecution—Procedure.

An offence against public justice is not an offence in contempt of Court within the meaning of s. 473, Act X of 1872. *

The Court, Civil or Criminal, which is of opinion that there is sufficient ground for inquiring into a charge mentioned in ss. 467, 468, 469, Act X of 1872, is not precluded by the provisions of s. 471, from trying the accused person itself for the offence charged. †

[163] CERTAIN persons were committed to the Court of Session for trial on a charge of causing grievous hurt. Ram Gholam, Gula Mal, and Jagat Mal gave evidence on behalf of these persons at the preliminary inquiry. The first two were also examined at the trial before the Court of Session, and gave the same evidence which they had given at the inquiry. The Court of Session considered that their evidence was false, and directed the Magistrate of the District to try them for giving false evidence. The Magistrate of the District transferred the case to the committing Magistrate. The latter proceeded also against Jagat Mal, being of opinion that he had given false evidence at the inquiry. He convicted all three persons. The conviction was, on appeal, affirmed by the Court of Session.

They applied to the High Court for the revision of the order of the Court of Session affirming the order of the Magistrate, on the ground that the Magistrate was not competent, under s. 471, Act X of 1872, to try an offence committed before himself.

Mr. Colvin for the Petitioners.—The petitioner Jagat Mal has been tried and convicted on a charge of giving false evidence by the Court before which the offence was committed. This procedure is directly opposed to the provisions of s. 471, Act X of 1872, which enacts that the Court before which an offence under s. 193, Indian Penal Code, is committed, may, after making such preliminary inquiry as may be necessary, either commit the case itself, or may send the case to any Magistrate having power to try or commit for trial. It is also opposed to the spirit of s. 473, which clearly recognizes the doctrine that no man shall be a judge in his own cause. It is true that a Court of Session may, under s. 472, try an offence committed before itself, but it does not do so

* So held by OLDFIELD, J., in *Queen v. Kultaran Singh*, ante p. 129, and by the Calcutta High Court in *Sufatoollah* petitioner, 22 W. R. Cr., 49. But see *Reg. v. Navranbeg Dulabeg*, 10 Bom. H. C. Rep., 73; and 7 Mad. H. C. Rep., Rulings xvii and xviii.

† See, however, *Queen v. Kultaran Singh*, ante p. 129; *Sufatoollah* petitioner, 22 W. R. Cr., 49; and 7 Mad. H. C. Rep., Rulings xvii and xviii, in which cases the opposite construction is placed on the section.

alone, it is aided by assessors or by a jury. It is inexpedient that the Court before which an offence is committed, and which has in all probability formed an opinion on the case, should itself try the offence. He cited 7 Mad. H. C. Rep., Rulings, xvii; *Sufatoollah*, petitioner (22 W. R. Cr., 49); and *Queen v. Kultaran Singh* (I. L. R., 1 All., 129). With regard to the petitioners Ram Gholam and Gula Mal, they are in the same position as Jagat Mal. Their statements before the Court of Session were [164] repetitions of what they had stated before the committing Magistrate. Their offences were really committed before the Magistrate. The transfer of the case under the last paragraph of s. 471 by the Magistrate of the District to whom it was sent to the committing Magistrate did not give the latter jurisdiction, if my argument is good and his jurisdiction was barred by the preceding portion of the section. If such transfer did do so, then the last portion of the section nullifies the first. The last portion has been enacted to obviate a practical inconvenience, the Courts having held under the old Code that the Magistrate to whom a case was sent for trial could not transfer it to a Magistrate subordinate to him, but was obliged to try it himself—6 Mad. H. C. Rep., Rulings, ii, xli.

The Junior Government Pleader (*Babu Dwarka Nath Banarji*) for the Crown.—No question can arise under s. 471 with respect to the petitioners Ram Gholam and Gula Mal. Their offences were committed before the Court of Session. Section 471 does not deprive the Magistrate before whom an offence mentioned in the section is committed of any power which he may possess to try the case.

Stuart, C. J.—This is an application for revision of the order of the Judge of Farukhabad made in an appeal to him by Ram Gholam, Gula Mal, and Jagat Mal. These three persons were, along with others, tried and convicted by Mr. C. W. Watts, Joint Magistrate of Farukhabad, of false swearing, under s. 193, Indian Penal Code, and respectively sentenced by that officer to two years' rigorous imprisonment.

The circumstances out of which the case arose are these. In January last three men, Kanhaiya, Bishan, and Lalman, were prosecuted and convicted by the Judge on a charge of grievous hurt, under s. 326, Indian Penal Code. After convicting and sentencing them, the Judge directed that ten of the witnesses who had been examined in the case before him, including Ram Gholam and Gula Mal, should be tried by the Magistrate of the District on a charge of giving false evidence. On receipt of the Judge's order, Mr. Harrison, the Magistrate, transferred the case to Mr. Watts, the Joint Magistrate, who had made the commitment in the grievous hurt [165] case to the Sessions Court. In the course of his investigation for that commitment, Jagat Mal had been examined as a witness, and had then, in Mr. Watts' opinion, given false evidence, and Mr. Watts, having represented this state of things to the Magistrate, received sanction for Jagat Mal being included in the proceedings directed by the Judge under s. 193. Mr. Watts having concluded the inquiry, committed the whole eleven accused for trial before himself, and convicted Ram Gholam, Gula Mal and Jagat Mal, and another (deferring judgment as regards the remaining seven). There was an appeal to the Judge, but the result was its dismissal by him.

Ram Gholam, Gula Mal, and Jagat Mal now apply to this Court in revision, urging that Mr. Watts had no jurisdiction to try and convict them, because, according to the terms of s. 471 of the Criminal Procedure Code, he should have sent the case to another competent Magistrate. This, however, is a clearly mistaken view of the law, Mr. Watts being fully competent for all

he did. The only case where a Criminal Court cannot itself try is that described in s. 473, which relates exclusively to contempts of Court. Here the charge was not for a contempt, but under s. 193 for false swearing. The conviction and sentence in the case of the three applicants are approved and confirmed, and their application to this Court is refused.

NOTES.

[This case which had been dissented from in 1 Bom. 811 was **overruled** in 1 All. 625 F.B.]

[1 All. 166]

FULL BENCH.

The 24th April, 1876.

PRESENT :

SIR ROBERT STUART, K.T., CHIEF JUSTICE, MR. JUSTICE PEARSON,
 MR. JUSTICE TURNER, MR. JUSTICE SPANKIE,
 AND MR. JUSTICE OLDFIELD.

Ratan Singh and another.....Defendants
versus
 Wazir.....Plaintiff.

Act VIII of 1859, s. 354—Remand - Objection - Procedure.

Where an Appellate Court, under s. 354, Act VIII of 1859, refers issues for trial to a lower Court and fixes a time within which, after the return of the finding, either party to the appeal may file a memorandum of objections to the same, neither party is entitled, without the leave of the Court, to take any objection to the finding, orally or otherwise, after the expiry of the period so fixed without his having filed such memorandum.

ON special appeal by the defendants in this suit to the High Court, the Court (TURNER and SPANKIE, JJ.), under s. 354, Act VIII of 1859, referred certain issues for trial to the lower Court [166] and fixed a period of one week within which either party to the appeal might file a memorandum of objections to the finding of the lower Court. No such memorandum was filed by the appellants within the time fixed. At the further hearing of the appeal it was contended on their behalf that, notwithstanding this omission, they were entitled to urge objections to the finding.

As it appeared to the Court that the rulings of the Calcutta High Court in *Ashrufoonissa Begum v. Stewart* and *Woomesh Chunder Roy v. Jonardun Hajrah* and of this Court in *Munrakhun Lall v. Raheem Buksh* and *Sheo Gholam v. Ram Jeawun Singh* were at variance,* the Court referred the question raised by the appellants' contention to a Full Bench.

*In *Ashrufoonissa Begum v. Stewart*, 9 W. R., 438, the Calcutta High Court (LOCH and MACPHERSON, JJ.) declined to allow the respondent's counsel to object to the finding of the lower Court at the further hearing of the appeal, as no memorandum of objections had been filed within the time fixed. In *Sheo Gholam v. Ram Jeawun Singh*, H. C. R., N.-W. P., 1873, p. 114, this High Court (PEARSON and JARDINE, JJ.) held that the lower Appellate Court was not bound to receive memoranda of objections presented after time. In the first-mentioned case, however, it does not appear that the appeal was determined by the Court affirming without consideration the finding of the lower Court, and in the judgment in *Woomesh Chunder Roy v. Jonardun Hajrah*, 15 W. R., 235, it is stated that it was not the intention of the Court in *Ashrufoonissa Begum v. Stewart* to take the view contended for and overruled in *Woomesh Chunder Roy v. Jonardun Hajrah*, viz., that, where a party has failed to file a memorandum of objections, the Appellate Court is at liberty to decide the appeal without considering the finding. In the second-mentioned case, although the lower Appellate Court refused to receive the memoranda of objections, no further objections were offered at the hearing, but, on the contrary, the parties agreed to abide by the finding. In *Munrakhun Lall v. Raheem Buksh*, H. C. R., N.-W. P., 1872, p. 72, STUART, C.J., and PEARSON, J., held that the Court was not precluded by anything in the law from hearing an objection taken after time. See, however, *Noorun v. Khoda Buksh*, H. C. R., N.-W. P., 1866, p. 50, in which case this High Court (MORGAN, C.J., and PEARSON, J.) held, where an Appellate Court had remanded a case under s. 354, Act VIII of 1859, and fixed a time within which objections might be taken, that the Appellate Court was not competent to interfere with that portion of the lower Court's revised judgment to which no objection had been taken within time.

Munshi *Hanuman Parshad* (with him Pandit *Nand Lal*), for the Appellants.—An Appellate Court can admit an appeal presented after time. It can also allow an objection to the decision of a lower Court not taken in the memorandum of appeal to be taken at the hearing. It can, therefore, allow a party who may not have filed a memorandum of objections under s. 354, Act VIII of 1859, within the time fixed, to urge objections at the hearing. The Court is not bound by its order fixing a period, but can extend the period.

[167] Babu *Oprokash Chandar* (with him Lala *Ram Parshad* and Babu *Ram Das*), for the Respondent.—The Appellate Court has to fix a time within which the parties may file objections. This implies that the memorandum cannot be filed after that time. The section gives it no such discretion to extend such period as is given it to admit appeals presented after time or to hear objections not taken in the memorandum of appeal. The objections under s. 354 must be taken in writing and not orally.

Stuart, C.J.—I am clearly of opinion that objections to findings on remand, whether in writing or taken orally at the hearing of the appeal, may, with permission of the Court, be considered. Whether such objections may be allowed as of right may be doubted. I am rather inclined to think that the hard line drawn by the language of the Code excludes them. But that, on the other hand, we may, in our judicial discretion and in the interests of justice and the legal requirements of a suit, permit such objections to be taken, I should be sorry to think there can be any doubt. This is a High Court of Judicature, and when the Code of Procedure is merely silent, and does not expressly prohibit any particular action, we are entitled to use all necessary and proper means and appliances, the power to permit or refuse which must reside within the inherent authority of a Court of Record.

My answer to this reference, therefore, is that the objections to which it refers, whether in writing or taken orally, may, with permission of the Court, be received and considered, but that they cannot be admitted without such permission.

I may add that I have looked into the cases referred to in the order of reference and entirely concur in the rulings in the two cases of this Court (*Sheo Ghulam v. Ram Jeawan Singh*, H. C. R., N.-W. P., 1873, p. 114; *Munrakhan Lall v. Raheem Buksh*, H. C. R., N.-W. P., 1872, p. 72). One of them, that of *Munrakhan Lall v. Raheem Buksh* (H. C. R., N.-W. P., 1872, p. 72), was decided by Mr. Justice PEARSON and myself, and I firmly and advisedly adhere to every word of our judgment. There we said: "The terms of s. 354 are permissive; the parties *may* prefer objections within a specified time, after which the Appellate Court shall proceed to determine the appeal. There is nothing in the law to the effect that an objection [168] made after the time fixed shall not be listened to; and, indeed, when the Court proceeds to determine the appeal in reference to the evidence submitted, any objection made, or suggesting itself in the course of the hearing, would necessarily have to be considered, whether a memorandum of it had been previously filed or not, unless the Court determined the appeal by simply affirming without consideration the finding received. Such a course is not one which the section directs the Court to take in the event of no objection having been put forward in writing within the time specified. We are aware that it has been held that the objections cannot be received after the time fixed, but so strict a ruling is, in our opinion, beyond the terms, and not within the intention of the law. Here we allowed a week, and our meaning was that that should be the time *at least*: in other words, that a week should be allowed, subject to any further orders of

the Court, for reasons assigned or cause shown." That to my mind is a most satisfactory statement of the law on this point. The Calcutta cases do not seem to apply, but, so far as I can understand them, I dissent from their conclusions.

Pearson, J.—On full consideration I am of opinion that the intention of the law was effectively to limit the time within which objections might be taken to the findings submitted to the Appellate Court under s. 354. The words that either party may, within a time to be fixed by the Appellate Court, file a memorandum of any objection to the finding, imply that the memorandum may not be filed after that time. It seems unreasonable to hold that, although an objection may not be preferred in writing, it may nevertheless be urged orally after the expiry of the fixed period. Such an interpretation would defeat the object of the law. Just as the law fixes a time within which the appeal against the original decree or decision must be presented, so in the like manner the objections to the supplementary findings on fresh issues remitted for trial under s. 354 must be put in within the time fixed for the purpose. The Court might probably, on application and sufficient cause shown, extend the time in the same manner as an appeal may be admitted after time on sufficient cause being shown for the [169] delay in preferring it. The objections under s. 354 being of the nature of an appeal, s. 5, Act IX of 1871, might be applicable. I also presume that ss. 348 and 374 of the Code would be applicable in respect of findings under s. 354.

Turner and Spankie, JJ.—If an appeal is presented from the decree of a Subordinate Court and in the memorandum of appeal no objection is taken to the finding of the Subordinate Court on a question of fact, the appellant cannot, of right, urge or be heard in support of the objection at the hearing; he must obtain the special leave of the Court. And although in deciding the appeal the Court is not confined to the grounds set forth by the appellant in his memorandum, it would not ordinarily, we apprehend, be justified in interfering with a finding of fact to which no objection had been taken in the memorandum of appeal, unless the appellant could show that from some sufficient cause the objection was not taken at the proper time. Now when it becomes necessary for the right determination of the suit on the merits that an Appellate Court should remit an issue to the Court below for trial, the Code in s. 354 directs the Court below to try the issue and return its finding with the evidence to the Appellate Court; it declares that such finding and evidence shall become part of the record and it authorizes either party, *within a time fixed by the Appellate Court*, to file a memorandum of any objection to the finding, and on the expiration of that period it directs the Appellate Court to proceed to determine the appeal. There is no provision empowering a party to take objection to the finding at any other time than within the period fixed by the Appellate Court. It cannot be contended then that either party is as a matter of right empowered to take an objection at the hearing which he has neglected to take within the period allowed him by law.

There remains the question, can he do so by leave of the Court? After the return of the finding and evidence which by the terms of the law form part of the original record, the Appellate Court ought, in our judgment, to proceed as if the necessary issue had formed part of the record originally submitted to it with this difference, that it must determine not only the pleas in appeal but also any objection preferred within due time to the finding on the [170] issue remitted—and in determining the appeal the Court is not deprived of the

**Ashrufooniissa Begum v. Stewart*, 9 W. R., 438; *Woomesh Chunder Roy v. Jonardun Hajrah*, 15 W. R., 285.

powers conferred on it by s. 334. The finding on the issue remitted falls within those powers as much as the findings on the issues originally tried. If this be so, it follows that the Court might at the hearing allow a party to urge an objection to the finding which had not been taken at the proper time, and in deciding the appeal is not confined to the grounds set forth in the original memorandum or in any statement of objections to the finding on the issue remitted taken within due time; but the Court ought not as a matter of course to allow an objection to be urged which has not been taken at the proper time; it should satisfy itself that there are grounds which warrant the indulgence.

Oldfield, J.—It appears to me that a party who has failed to file a memorandum of objections within the time fixed by the Appellate Court under s. 354, Act VIII of 1859, cannot afterwards claim as of right to be allowed to urge objections: but I do not consider that it was intended to leave no discretion to the Court whether it should admit objections, either orally or in writing, after the time fixed had expired. I apprehend that the Appellate Court can always extend the time within which the written memorandum of objections can be filed.

NOTES.

[The same subject was considered in 2 All. 908; (1884) 6 All. 391. In 7 All. 79 the question arose with reference to Sec. 63 of the C. P. C. 1882.]

[1 All. 170]

FULL BENCH.

The 8th May, 1876.

PRESENT :

SIR ROBERT STUART, Kt., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, MR. JUSTICE SPANKIE,
AND MR. JUSTICE OLDFIELD.

Ganga Bai.....Plaintiff

versus

Sita Ram.....Defendant.

Hindu Law—Hindu widow—Maintenance.

Held by the Full Bench that a Hindu widow is not entitled, under the Mitakshara, to be maintained by her husband's relatives merely because of the relationship between them and her husband. Her right depends upon the existence in their hands of ancestral property.

Held, on the case being returned to the Division Bench, that the fact that the defendant in this case was in possession of ancestral immoveable property at the death of his son and had subsequently sold such property to pay his own debts, did not give the son's widow any claim to be maintained by him.

THE plaintiff was the daughter-in-law of the defendant Sita Ram. Her husband died in May 1858. For about 15 years [171] after his death she lived with and was maintained by Sita Ram. She then left his protection and went to live with her brother. A moiety of the house in which she

had lived with Sita Ram was the ancestral property of her husband's family. The other moiety was acquired by Sita Ram by purchase. In January 1874 he sold the house to the defendant Kailash Nath in order to satisfy certain debts contracted by him. This sale the plaintiff sued to set aside, claiming a declaration of her right to live in a certain portion of the moiety of the house which was ancestral property and possession of the same. She also claimed maintenance from her father-in-law at the rate of Rs. 5 per mensem out of a certain charitable allowance made him by Government. She also claimed to recover certain jewels which she alleged he had appropriated. He pleaded that the sale of the property was valid, being made to satisfy his debts, that the plaintiff was not entitled to be maintained out of the charitable allowance, as it was not ancestral property, and that, as no ancestral property remained in his hands, he could not be legally compelled to maintain the plaintiff; and denied having appropriated the jewels. The defendant Kailash Nath pleaded that the sale was valid.

The first Court gave the plaintiff a decree declaring that she was entitled to reside in the house on the ground that such right was not extinguished by the sale. It dismissed her claim to be maintained out of the charitable allowance on the ground that it was not of the nature of ancestral property, and held that, as no ancestral property remained in the defendant Sita Ram's possession, she was not entitled to be maintained by him. It also dismissed her claim in respect of the jewels on the ground that she had failed to prove that the defendant had appropriated them. On appeal by the plaintiff the lower Appellate Court affirmed the decision of the first Court. The defendant Kailash Nath was not a party to the appeal.

* On special appeal by the plaintiff to the High Court it was contended on her behalf that the right of a daughter-in-law to be maintained by her father-in-law did not depend upon the existence in his hands of ancestral property; that the pension could not be considered as the exclusive and acquired property of the defendant, and that [172] the lower Appellate Court had not given the claim in respect of the jewels sufficient consideration.

The Court (PEARSON and TURNER, J.J.) made the following reference to a Full Bench:-

The plaintiff in this suit claimed an allowance of Rs. 5 per mensem by way of maintenance from her father-in-law, the (defendant) respondent, and to be allowed to occupy two rooms in a house in which her deceased husband had an equal right with him, and to recover certain trinkets. The lower Courts have dismissed the first and last portions of the claim, and decreed the second; and in regard to that portion of the claim which has been decreed objection to the decree has not been made by the defendant who, as purchaser of the house, is interested in the matter.

The plaintiff is the appellant whose pleas we have to consider, and we at once disallow the second and third of the pleas set forth in the memorandum of appeal, concurring as we do in the lower Court's finding that the allowance drawn by Sita Ram is not of the nature of ancestral property, and being of opinion that the Judge has sufficiently disposed of the issue relating to the trinkets in suit.

There remains the question as to the plaintiff's right to receive a money allowance by way of maintenance from her father-in-law under the circumstances found by the lower Courts. Those circumstances are as follows:—Her husband died about 15 years ago, and after his death, until lately, she resided with her father-in-law, and was maintained by him, and she has not forfeited

by misconduct any right which she may possess to be maintained by him. He has recently sold a moiety of a house, which descended to him from his grandfather, to Kailash Nath Sukul, the other defendant in the suit, who is not a party to the appeal nor an appellant here: the value of the moiety is reckoned at Rs. 850. But the plaintiff's claim to occupy two rooms in the house has been decreed. There is no ancestral property left in Sita Ram's possession, and it is for this reason that her claim to a maintenance payable by him has been dismissed.

It is now contended on her behalf that, notwithstanding the non-existence of any ancestral fund or property in the hands of her [173] father-in-law applicable to the maintenance, she is, under the provisions of the Hindu law, entitled to be maintained by him, and our attention has been drawn to a recent ruling of the Bombay High Court in a case decided by WEST and NANABHAI HARIDAS, JJ. (*Udaram Sitaram v. Sonkabai*, 10 Bom., H. C. Rep., 483), to the effect that a Hindu father-in-law is legally bound to maintain his deceased son's widow, notwithstanding that no property belonging to his son may have come into his hands. The Court appears to have also held in other cases that a Hindu father is liable for the maintenance of his son's widow, notwithstanding a separation in estate of father and son. These rulings do not absolutely support the present contention, because they do not negative the hypothesis of ancestral property being in the father's possession. A Full Bench of this Court has recently recognized the right of the widow of a son who predeceased his father to be maintained out of ancestral funds or properties in the latter's possession (H. C. R., N.-W. P., 1875, p. 261). Whether such a widow has a right to be maintained by her husband's relations, irrespectively and independently of the existence in their hands of such funds or properties, under the law obtaining in this part of India, is a novel question, which, with regard to its importance, we think it proper to refer to a Full Bench for determination.

Munshi Hanuman Parshad for the Appellant: A daughter-in-law can, in default of better heirs, succeed to the estate of her father-in-law, and can present funeral oblations. West and Bühl's Digest of Hindu Law cases, Bk. i, pp. 169, 170. When her husband is dead his kin become her guardians and she looks to them for support. West and Bühl's Digest, Bk. i, p. 355. She, in fact, becomes a member of her husband's family. It is nowhere said that her right to maintenance depends upon the existence of property. Moreover in this case there originally was property. By selling it the father-in-law has rendered himself personally liable.

Pandit Bishambhar Nath (with him the Senior Government Pleader, Lala Juah Parshad), for the Respondent: There is no text which lays down that a father-in-law, or other relative of the husband, is bound to maintain the daughter-in-law, in the absence [174] in his hands of ancestral property. Whenever the subject of maintenance is considered, the existence of property is assumed. Mitakshara, ch. ii, s. 1, v. 35; Smriti Chandrika, ch. xi, s. 1, v. 34; and Vyavahara Mayukha, ch. iv, s. 8, v. 7. In *Udaram Sitaram v. Sonkabai* (10 Bom., H. C. Rep., 483) the question is not fully considered. No texts are cited and only European authors referred to.

Stuart, C.J., Turner and Spankie, JJ., concurred in the following opinion:

As we understand the question put to us we must assume for the purpose of this reference that the father-in-law is in possession neither of ancestral nor immoveable property, that he has no fund with the disposal of which his son, if alive, could interfere, that he has inherited nothing from his son, nor have

his rights in any property become enlarged by his son's death. Under those circumstances, the plaintiff's pleader has failed to satisfy us that her father-in-law is under any legal obligation to provide her with maintenance. No text has been cited from any work of authority in these Provinces which supports the claim, nor has any decision been produced in which it has been ruled by any Court in these Provinces or in this Presidency, or in those parts of the Presidency of Madras which are governed by the Mitakshara, that such a claim has been allowed. The right, then, of the daughter-in-law appears to be one of moral and not of legal obligation.

Hindu Law no doubt imposes on the daughter-in-law the duty of living in the house of her father-in-law, yielding him obedience and ministering to his needs, but the Privy Council, in *Raja Pirthee Singh v. Rani Rajkooer* (12 B. L. R., 238) has ruled that this is merely a moral obligation, and that she does not even forfeit her right to maintenance if she incapacitates herself from performing her duty to her father-in-law by electing to reside elsewhere than in his house. Except in so far as the possession of property liable to a charge of maintenance alters the nature of the obligation of the father-in-law to the daughter-in-law, there is no more ground for holding that he is legally bound to support her than there is for asserting that [175] she is legally bound to live in his house and minister to his wants. Of both duties the neglect is discreditable in this world, and may, according to the Hindu religion, subject the offender to punishment hereafter.

Pearson, J. - My answer to the question put to us must be in the negative. In the case of *Lalit Kuur v. Ganga Bishan* (H. C. R., N.-W. P., 1875, p. 261), to which allusion is made in the referring order, I assented, not without doubt and hesitation, to the doctrine that a Hindu widow was entitled to be maintained out of the joint ancestral estate of the family of which her husband was a member, although he had predeceased his father. That doctrine, although not expressly laid down in the Hindu law, was supported by many considerations of reason and equity, and had been recognized by several decisions. But I am not prepared to go further and to allow that a widow is legally entitled to be maintained by her husband's relations after his death *merely* in consequence of such relationship. The texts which countenance such a view appear to be of the nature of moral or religious precepts. In the oral pleading before us it has indeed been mainly urged that the respondent is liable to the claim of the plaintiff, appellant, because he sold an ancestral house; but this argument was not the plea set forth in the first ground of the appeal, and we can only address ourselves to the question referred to us.

Oldfield, J. - The legal right of a widow to maintenance from her husband's family can, I apprehend, scarcely be supported with reference solely to those texts of Hindu Law which indicate the position a woman obtains by marriage in her husband's family, and those which generally inculcate the duty of maintenance of the female members of a family.

It is said that by marriage a woman leaves her own family or gotra and enters that of her husband, and her connection with her own family is at an end. There is the passage of Vijnanesvara translated in West and Bühler's Digest of Hindu Law Cases, Bk. i, p. 141, declaring the wife and husband to be Sapinda relations to each other because they together beget one body (the son), the Sapinda-relationship arising by connection with [176] one body, either immediately or by descent; and there are other texts on the connection formed by marriage, such as—"Women by marriage are born again into the family of the husband."—"By marriage a husband and wife become one person."

These texts admittedly do not mean that a woman on marriage enters into her husband's family or gotra in the sense that she enters it assuming the rights of a daughter. Were it so, she would inherit in the same way as a daughter, and if she cannot claim under these texts the full rights of a daughter by reason of entering the family or gotra of her husband, I do not see how any legal claim to maintenance can be supported on that ground; the ground, if good at all, should be good for entitling her to the full position of a daughter.

The above texts and others which inculcate in general terms on women dependence on their husbands' family and impose a duty of maintenance on the husbands' family do not necessarily impose any legal obligation. This distinction, which is one to be carefully observed in applying texts of the Hindu writers, was pointed out by Sir Barnes Peacock, Chief Justice of Bengal, in *Khetramani Dasi v. Kashinath Das* (2 B. L. R., A. C., 15; S.C., 10 W. R., F. B., 89), and the rule appears to be that when the deceased member of a family has left property, they who take it to the exclusion of his widow will be legally bound to maintain her out of the property. There is the following passage in *Viramitrodaya* cited at the hearing of this reference:—“The brother and others taking the wealth of the husband of an istri widow other than a putni capable of receiving her husband's share should allow subsistence to her.” “To give” means “must give.” “Regarding this is also the text of Narada—that all virtuous widows should be allowed food and raiment by the husband's eldest brother or father-in-law, or by a person born in the same family. This text means all those taking the wealth of the husband, for subsistence is allowed because of taking wealth,” and there are other texts to the same effect—Colebrooke's Digest, vol. ii, Bk. v, ch. i, s. 1, cccxii, Smriti Chandrika, ch. xi, s. 1, v. 34. This particular obligation, so expressly declared, is probably founded on the intimate connection which marriage is held to give rise to between husband and wife, as shown by the texts I have already cited, and which is said [177] to extend to the property; for instance, we have the text in Smriti Chandrika, ch. ix, s. 2, v. 14—“It must be understood that in a husband's property the wife by reason of marriage possesses always ownership, though not of an independent character”—and Colebrooke's Digest, vol. ii, Bk. v, ch. viii, s. 1, cccciv.

In a joint family where there is ancestral property such a legal obligation will lie on the father-in-law to maintain his son's widow—*Lulti Kuar v. Ganga Bishan* (H. C. R., N.-W. P., 1875, p. 261); but in a case like the present, where the property is entirely the self-acquired property of the father, the son in his father's lifetime cannot be said to have had such an interest in the property as will impose at his death an obligation on his father to maintain the widow.

When the case came back to the Division Court (TURNER and PEARSON, JJ.) for disposal—

Munshi Hanuman Parshad, for the Appellant, contended that the respondent had made himself personally liable for the appellant's maintenance. He has sold for his own benefit property which, as he held it as ancestral property, was charged with the maintenance of his son's widow.

Pandit Bishambhar Nath, for the Respondent, was not called upon to reply.

The Judgment of the Court, so far as it related to the contention on behalf of the Appellant, was as follows:—

We accept the opinion of the Full Bench on the general rule that a father-in-law, who is not in possession of ancestral property, is not legally bound to maintain his daughter-in-law. The appellant's pleader now contends that there

are peculiar circumstances which take this case out of the purview of that general rule, namely, that one moiety of a house valued at Rs. 425 was held by the respondent as ancestral property and was sold by him. This is true, but it is shown that the sale was made to pay debts. It was then a sale which the son himself, if alive, could not have resisted, for it is not suggested the debts were contracted for immoral purposes. Consequently, in our judgment, the alienation by the father-in-law does not in this case impose on him personal liability of maintaining the appellant.

NOTES.

[HINDU LAW—MAINTENANCE—]

The son's widow has no right of maintenance against the father-in-law when there is no joint property :—(1882) 7 Bom. 127; (1878) 2 Bom. 573 F. B. (1878) 3 Bom. 44; but it becomes a legal obligation in the hands of his heirs taking his separate property :—(1899) 28 Bom. 608; (1868) 11 All. 194. See also 25 Bom. 263; 29 Cal. 557. As to when the maintenance is a charge see (1877) 2 Bom. 494; (1882) 4 All. 296.]

[178] FULL BENCH.

The 11th May, 1876.

PRESENT :

SIR ROBERT STUART, Kt., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, MR. JUSTICE SPANKIE, AND
MR. JUSTICE OLDFIELD.

In the Matter of the Petition of Harshankar Parshad.

Act VIII of 1859, s. 338—Act XXIII of 1861, s. 38—Execution of Decree—Appeal—Miscellaneous proceedings.

Pending the determination of the appeal against an order passed in execution of decree, the Appellate Court has power, under s. 338, Act VIII of 1859, and s. 38, Act XXIII of 1861, to stay execution.*

THIS was an application to the High Court by the judgment-debtor for the postponement of a sale in the execution of a decree pending the determination of a miscellaneous regular appeal to the Court against the order of the Court of First Instance refusing to postpone the same. The application was referred to a Full Bench by the Court (PEARSON, J.), the order of reference being as follows :—

This application is stated to be preferred under the provisions of s. 338, Act VIII of 1859, a section which refers to the subject of staying the execution of decrees under appeal. There is no appeal pending in this Court against the decree which is in course of execution. I am, therefore, of opinion that s. 338 is *prima facie* inapplicable to the present case. Whether it can be held to be

* The following sections of Act VIII of 1859 have been held applicable to proceedings in execution of decree:—Section 6, see next case; Section 110, *Rajpal v. Chooraman*, H. C. R., N.W. P., 1872, p. 10; Section 119, *Sectul Pershad v. Mahomed Kureem Khan*, H. C. R., N.W. P., 1873, p. 164; section 170, *Syud Deshan Hossein v. Khodeja*, 8 W. R., 64; Section 372, *Tara Chand Ghose v. Anand Chandra Choudhry*, 2 B. L. R., A. C., 110; S.C. 10 W. R., 450; Section 378, *Narayanbhai v. Gangakrishna*, 4 Bom. H. C. R., A. C., 87. See, however, the case of *Jodoo Monee Dossee*, 11. W. R., 494.

I.L.R. 1 All. 179 IN THE MATTER OF HARSHANKAR PARSHAD [1876]

applicable under s. 38, Act XXIII of 1861, is a question which I refer to the Full Bench, as I am informed that the practice of the Court in dealing with applications of the nature of the present is not uniform. To allow the present application would in effect be to allow the appeal beforehand.

The Junior Government Pleader (*Babu Dwarka Nath Banurji*) for the Petitioner.

[179] The Opinion of the Full Bench was as follows :—

Proceedings in execution of decree would not, in our opinion, ordinarily fall within the term "miscellaneous proceedings." They should be regarded rather as stages in the suit or proceeding in which the decree or order under execution was passed: whereas by miscellaneous proceedings we should understand ordinarily those applications commenced by petition, and not by plaint, of a less formal character than suits, and generally if not universally calling on the Court to exercise special powers conferred on it by the Legislature, such as applications for certificates to collect debts, applications for probate or letters of administration, applications for appointment of guardians, etc.; and possibly also the term miscellaneous proceedings may also be applied with propriety to those proceedings which the Court is empowered to institute of its own motion, such as proceedings for the institution of prosecutions in certain cases.

But unless we hold that the term miscellaneous proceedings in s. 38 has a wider significance, and applies to all proceedings for which no special provision is made, the Court appears to be left without powers which are necessary to enable it to deal with such proceedings. It would have no power to deal with them in default of appearance: it would have no power to enforce the attendance of witnesses: and there are no directions as to the form of the order nor as to the form of appeal from an order passed in such proceedings in cases in which an appeal lies.* We would, therefore, read the term in this section as embracing all proceedings, not being regular suits or appeals, for which no procedure is expressly provided, and in that sense it embraces proceedings in execution of decree! In support of this contention, it may be mentioned that, in mofussil Courts, proceedings in execution have been treated as falling within the class [180] of "mutafarrikat," or miscellaneous proceedings or cases, as opposed to "nambari," or regular suits, and appeals from orders passed in proceedings in execution have up to the present time been filed as miscellaneous appeals. We are, therefore, of opinion that the Court had power to stay execution under the circumstances stated in the reference.

NOTES.

[A similar ruling was given by the Calcutta High Court in (1901) 28 Cal. 734. See also 1 All. 180.]

* The section gives no right of appeal in such proceedings — see *Hureenath Koondoo v. Modhuo Saundan Saha*, 19 W. R., 122.

† The following, in addition to proceedings in execution of decree, have been held to be "miscellaneous proceedings" within the meaning of s. 38, Act XXIII of 1861 :—

Proceedings under s. 246, Act VIII of 1859—*Bapu v. Lakshuman Baji*, 10 Bom. H.C.R., 19.

Enquiries by Civil Courts under s. 171, Act XXV of 1861, corresponding to s. 471, Act X of 1872—The case of the *Collector of Tirhoot*, 14 W. R., 390.

Applications to the Bombay High Court for the exercise of its Extraordinary Jurisdiction under Bombay Regulation II of 1827, s. 5, cl. 2—

The petition of *Nagappa*, 5 Bom. H. C. R., A. C., 215.

[1 ALL. 180]

FULL BENCH.

The 11th May, 1876.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, MR. JUSTICE SPANKIE, AND MR. JUSTICE OLDFIELD.

Gaya Parshad.....Decree-holder

versus

Bhup Singh and others.....Judgment-debtors.

Act VIII of 1859, s. 6—Act XXIII of 1861, s. 38—Execution of Decree—
Miscellaneous proceedings—Transfer.

A District Court is competent, under s. 6, Act VIII of 1859, and s. 38, Act XXIII of 1861, to transfer to its own file proceedings in execution of decree pending in a Court subordinate to it.*

THE District Judge of Mirzapur was informed by the Subordinate Judge that a person applying in his Court for the execution of a decree was a person to whom he owed money, and that he considered himself precluded by that fact from entertaining the application. The District Judge consequently transferred the case to his own file by an order purporting to be made under s. 25, Act VI of 1871, and eventually rejected the application.

On appeal to the High Court by the decree-holder it was contended that the District Judge was not competent to transfer the case.

The Court (PEARSON and OLDFIELD, JJ.), observing that the Subordinate Judge was not precluded from executing the decree himself by the provisions of s. 25, Act VI of 1871, and that that enactment contained no provisions enabling a District Judge to call up and place on his own file a case of execution of decree pending on the file of a subordinate Court, referred the following question to a Full Bench, viz.—

“Whether he was competent to do so under the terms of s. 6, Act VIII of 1859, or s. 38, Act XXIII of 1861, or otherwise?”

[181] The Junior Government Pleader (Baboo Dwarka Nath Banarji) and Munshi Hanuman Parshad for the Appellant.

Pandit Ajudhia Nath and Babu Oprokash Chundar for the Respondents.

The Junior Government Pleader.—There is no law which authorizes the transfer of proceedings in execution of decree. The term “suit” in s. 6, Act VIII of 1859, does not include them. The term “appeal” in the same section means an appeal against a decree. Proceedings in execution of decree are not miscellaneous proceedings within the meaning of s. 38, Act XXIII of 1861.

Pandit Ajudhia Nath.—The term “suit” embraces all proceedings relating to the suit whether before or after decree. The term “appeal” includes miscellaneous appeals. The terms of s. 38 are large enough to include proceedings

* See preceding case, p. 178, note (1).

in execution. The intention of the section is clear, and a reasonable construction must be placed on it. It is a curious state of things if such proceedings cannot be transferred, and other kinds of cases can.

The Opinion of the Full Bench was as follows :—

In our judgment the provisions of s. 6, Act VIII of 1859, are extended to miscellaneous proceedings, and inasmuch as we have this day held on a reference in the case of *Harshankar Parshad* that proceedings in execution fall within the term "miscellaneous proceedings" in s. 38, we reply that the Judge had power to transfer the proceedings in the case out of which this reference arose.

NOTES.

[The Calcutta High Court did not follow this case in (1887) 15 Cal. 177; but see (1897) 22 Bom. 778 as to the power of transfer under C. P. C. (1882), s. 25.]

[1 All. 181]

FULL BENCH.

The 11th May, 1876.

PRESENT :

MR. JUSTICE PEARSON, MR. JUSTICE TURNER, MR. JUSTICE SPANKIE,
AND MR. JUSTICE OLDFIELD.

Ram Dial and others

versus

Ram Das and another.*

Act VIII of 1859, s. 254—Sale in execution—Defaulting Purchaser—Appeal—High Court—Appellate Civil Jurisdiction—Division Court—Letters Patent, cl. 10.

An appeal lies from an order passed on an application under s. 254, Act VIII of 1859, to make a defaulting purchaser liable for the loss occasioned by a resale.

[182] Held (SPANKIE, J., dissenting) that the appeal given to the Full Court under cl. 10, Letters Patent, is not confined to the point on which the Judges of the Division Court differ.

THE facts of this case, so far as they are material for the purposes of this report, were as follows :—

Ram Das and Gobind Parshad, decree-holders, sought under s. 254, Act VIII of 1859, to charge Ram Dial and certain other persons, as being defaulting purchasers at an auction-sale of certain property, with the deficit on the resale of the property, alleging that the said Ram Dial and others had bid for the property through one Kali Charan, that the property was knocked down to Kali Charan, and that he had paid the deposit out of moneys belonging to them and given their names as purchasers. The alleged defaulting purchasers repudiated the purchase of the property, denying that Kali Charan had authority to bid for it on their behalf. The Court of First Instance rejected the application of the decree-holders on the ground that it was not satisfactorily proved

* Appeal under cl. 10, Letters Patent, No. 9 of 1876.

that the alleged defaulting purchasers had authorized Kali Charan to purchase the property in question on their behalf. On appeal to the High Court by the decree-holders against the order of the first Court, the objection was taken on behalf of the alleged defaulting purchasers, the respondents, that no appeal lay.

The Senior Government Pleader (*Lala Juula Parshad*), for the Respondents.—Under s. 11, Act XXIII of 1861, an appeal lies only as between the parties to the suit. In this case only one of the parties to the appeal was a party to the suit. Had the order of the lower Court been against the respondents, as auction-purchasers, they could not have appealed from it. Section 254, Act VIII of 1859, gives no appeal.

Mr. Conlan for the Appellants.—The argument that an auction-purchaser as such cannot appeal against an order passed in execution of decree is not applicable. Section 254, Act VIII of 1859, places the defaulting purchaser in the position of a judgment-debtor when it makes all the rules for enforcing the payment of money in satisfaction of a decree of Court applicable to him. Under those rules a judgment-debtor can appeal, and therefore the person whom the law places in a similar position can appeal. He cited *Sooruj Buksh Singh v. Sree Kishen Doss* (6 W. R., Mis., 126) and *Joobraj Singh v. Gour Buksh Lal* [7 W. R., 110; see also *Sree Narain Mitter v. Mahtab Chund* (3 W. R., 3)].

[183] Pandit Ajudhia Nath, for the Respondents, in reply.—The decree-holder is not the proper person to proceed against the defaulting purchaser, but the judgment-debtor.

Stuart, C.J.—A preliminary objection is taken by the pleader for the respondents that this appeal does not lie, on the ground that the order complained of is one relating to the execution of a decree as provided by ss. 363 and 364 of the Code, which limit appeals from orders passed in execution of a decree to the parties to the suit in which the decree was passed, and that the defaulting purchaser, by the enforcement of s. 254, is not a "party" within the meaning of s. 11 of Act XXIII of 1861. But this is an objection which, in my opinion, cannot be maintained. Section 254 applies to the case of default by a purchaser within the prescribed time, and it provides that—"If the proceeds of the sale which is eventually consummated be less than the price bid by such defaulting purchaser, the difference shall be leviable from him under the rules for enforcing the payment of money in satisfaction of a decree of Court;" and several rulings of the Calcutta High Court were referred to in support of the contention that a defaulting purchaser was, under s. 254, placed in the position of a judgment-debtor, and therefore a "party" within the meaning of s. 11, Act XXIII of 1861. Our attention was, among others, particularly directed to a ruling to this effect by Mr. Justice LOCH and Mr. Justice MACPHERSON [*Joobraj Singh v. Gour Buksh Lal*, (7 W. R., 110)], and such ruling I approve. The question, however, does not appear to have been finally determined in Calcutta, for in a case * decided there so late as August 1873, before a Full Bench on appeal from a Division Bench, the Chief Justice, after disposing of the case, observed that—"This decision must not be understood as in any way deciding that an appeal will lie in such a case as this. It has not been necessary for us to determine that." I should be glad to be instructed by the High Court of Calcutta **[184]** when it finally and advisedly delivers its mind on this question; but meanwhile I am not relieved of the duty of forming and expressing my own opinion, which is in accordance with the judgment of Mr. Justice MACPHERSON.

* *Huree Ram v. Ilur Parshad Singh* (20 W. R., 397); and see *Sooruj Buksh Singh v. Sree Kishen Doss* (9 W. R., 500), and *Bisokha Moyee v. Sonatun Doss* (16 W. R., 14), in which some doubt is expressed on the point.

And meanwhile I may observe that, in the above case, and notwithstanding the remark of Sir RICHARD COUCH, the appeal was entertained, and apparently without objection. Even if I was more doubtful than I am on the subject, the reasonableness and convenience of procedure by appeal in such a case as the present appears to me to be so great as to afford a presumption in its favour, and I feel bound to decide in favour of its competency, and that the order therefore of the Subordinate Judge is open to appeal. [After considering the appeal on its merits and expressing his opinion that the decision of the Court of First Instance was erroneous, the learned Chief Justice proceeded as follows :—] The appeal must therefore be allowed, and the order of the Subordinate Judge reversed with costs against the respondents in both Courts.

Spankie, J.—This is a case in which action was taken under s. 254 of Act VIII of 1859, under the following circumstances :—The holders of a decree against Shaikh Iradatullah, judgment-debtor, took out execution of the same, and caused the rights and interests of their debtor in Tal Ratwi, amongst other properties, to be sold on the 21st July 1873. Four persons—Champa Ram, Ram Dial, Bundhu Ram, and Kaidar Ram—purchased the rights in Tal Ratwi through their agent for Rs. 9,600. They paid the earnest-money, but failed to deposit the balance within the prescribed time. The property was resold and was purchased on the 21st November of the same year for Rs. 1,000. The second purchaser also failed to make the necessary deposits. The property was again put up for sale and was bought on the 20th May 1874, by Shaikh Muzlur Ali for Rs. 1,000, and the sale was confirmed. The decree-holders now claim that the difference, Rs. 8,600, between the sale eventually consummated and the price bid by the defaulting purchasers, shall be levied from them under the rules for enforcing the payment of money in satisfaction of a decree of Court (s. 254, Act VIII of 1859).

The Subordinate Judge held that the difference would be claimable from the first auction-purchaser who defaultered ; but in [185] this case he was of opinion that there was not sufficient proof that Kali Charan had authority from Champa Ram, etc., to purchase for them the rights and interests in Tal Ratwi. He therefore rejected the application of the decree-holders as against these persons.

An appeal is filed by the decree-holders which is met by a preliminary objection on the part of the respondents that no appeal lies, the other auction-purchasers on the first sale being no parties to the suit, so as to bring them under the provisions of s. 11, Act XXIII of 1861.

I am aware that there are decisions bearing on the point in the Calcutta High Court, two of them being cited from the 6 and 7 W. R. In the latter case, the view taken would appear to be that the terms of the section (254) bring any one proceeded against under it amongst the parties of the suit. I am not, however, satisfied that this is so. The section certainly does not say so. The section recites that the difference shall be leviable from the defaulting purchaser under the rules for enforcing the payment of money in satisfaction of a decree of Court, that is to say, by an application for execution against him by arrest, or by attachment of his property. But the section does not go on to say that when any application has been made against such defaulting purchaser, he is to be regarded as one of the parties to the original suit in which execution was taken out. On the other hand, s. 364 recites that no appeal shall lie from any order passed after decree and relating to the execution thereof, except as is hereinbefore expressly provided. The appeal is not expressly provided for in s. 254. It is provided for in s. 257. So s. 283 provides for an appeal. But that

section has been repealed by s. 11, Act XXIII of 1861, and this section, though it greatly enlarges the matter of which the Court executing a decree may take cognizance, inasmuch as, after expressly stating what it may do specifically, it includes any other question arising *between the parties* to the suit in which the decree was passed and relating to the execution of the decree, does not meet the difficulty. The question before us certainly relates to the execution of the decree, but is it one between the decree-holder and the judgment-debtor? It might be convenient to hold so, as giving the defaulting purchaser, the decree-holder, and the judgment-debtor an opportunity of being heard by the Appellate Court. On the other hand, it may have been intended not to give a defaulting purchaser the benefit of an appeal on the summary side. There could be no doubt of his default, where, in consequence of it, resale has been rendered necessary; and there can be no doubt as to the injury such default may do both to the decree-holder and judgment-debtor. The defaulting purchaser appears to me to be in the position of a man who has allowed judgment to go against him by default. He has nothing to say for himself, and execution follows against him as a matter of course. But then, if there be an appeal, it would lie because he was the judgment-debtor in another suit between the original decree-holder and himself, or the judgment-debtor and himself. I do not find that the Presidency High Court's decisions (6 W. R., Mis., 126 : 7 W. R., 110) already referred to have been accepted as conclusively settling the point. On the contrary, I find an appeal in a case (20 W. R., 397) very similar to the one before us, wherein it was held that the party purchasing at an execution-sale under the Civil Procedure Code in the character of an agent cannot be made liable as a principal, and a proceeding upon the contract under s. 254 of the Act in such a case must be taken against the principal. This was an appeal under cl. 15 of the Letters Patent from a Divisional Bench, and the Full Bench decided which of the two judgments before it was to be followed; but the Chief Justice added at the close of the judgment that "this decision must not be understood as in any way deciding that an appeal will lie in such a case as this. It has not been necessary for us to determine that." From this I conclude that the point was not held to be definitely determined by the High Court of the Lower Provinces. It has not, to my knowledge, been determined by this Court.

I think that it would be better that we should take the opinion of the Full Bench before disposing of the appeal on its merits. At the same time, if the learned Chief Justice should hold that there is an appeal, his judgment would prevail, and I should have no hesitation in concurring with his decision on the merits, as we were both satisfied at the hearing that all the evidence was in favour of the appellants.

[187] The respondents appealed to the Full Court against the judgment of the learned Chief Justice, under cl. 10 of the Letters Patent of the High Court.

Munshi *Hanuman Parshad* (with him the Senior Government Pleader and Pandit *Ajudhia Nath*) for the Appellants. -- The question whether an appeal lies from the order of the Court of First Instance depends on the intention of s. 254 and the sections of the Civil Procedure Code relating to the procedure in execution of decree. The Code is clearly framed on the principle that there shall be no appeal except by parties to the suit in which the decree is passed. The defaulting purchaser does not, under s. 254, stand in the place of a judgment-debtor. He is subjected to a penalty under that section, and provision is made for the recovery of such penalty. The section does not say that the proceedings taken to recover the penalty shall be taken as part of the execution of the decree. No appeal has as yet ever been allowed to an auction-purchaser. He proceeded

to argue that the evidence did not satisfactorily prove that Kali Charan was authorized by the appellants to purchase Tal Ratwi.

Mr. Conlan (with him Mr. Colvin and Pandit Bishambar Nath) for the Respondents.—The learned Judges are agreed on the merits of the case. They find that the appellants were auction-purchasers. This finding cannot be questioned in appeal to the Full Court. He referred to *Roy Nandipat Mahata v. Urquhart* (4 B. L. R., A. C., 181; s.c., 13 W. R., 209).

Munshi Hanuman Parshad for the Appellants.—The appeals allowed under cl. 10 of the Letters Patent are in the nature of regular and not of special appeals. I can argue in this case on the merits.

The judgment of PEARSON, TURNER, and OLDFIELD, JJ., in so far as it is material for the purposes of this report, was as follows:—

We proceed to consider in the first place the issue on which the learned and honourable Judges differed.

The provisions of s. 254, Civil Procedure Code, declare that, if the purchaser of immoveable property at an auction-sale held in execution of a decree, after payment of the deposit, fails to make good the full amount of the purchase-money before sunset of the [188] fifteenth day from that on which the sale took place * * * the deposit after defraying the expenses of the sale shall be forfeited to Government, and the property shall be resold * * * and that, if the proceeds of the sale which is eventually consummated be less than the price bid by such defaulting purchaser, the difference shall be leviable from him under the rules for enforcing the payment of money in satisfaction of a decree of Court.

Had the law simply declared the liability of the defaulting purchaser without going on to declare how that liability should be enforced, the proceeding must have been by suit. To avoid the circuity of the proceeding by suit, the Legislature has given to the decree-holder and judgment-debtor a more speedy remedy, and the defaulting purchaser is placed in a position which is very similar to that which he would have filled had a suit been brought against him. It is true there is this difference, that in a proceeding by suit the question now in issue between the parties would have been determined prior to and not subsequently to decree. In other respects his position is assimilated to that of a judgment-debtor and the rules for enforcing a decree against the judgment-debtor are made available to enforce the demand arising out of his default against the defaulting purchaser. Among these rules is the rule ordained by s. 11, Act XXIII of 1861, which gives a right of appeal to the parties to a suit on all questions arising in the execution of the decree and relating to the execution thereof. There seems no difficulty in applying this rule *mutatis mutandis* to the proceeding taken against the defaulting purchaser. The judgment-debtor and (if his claim be not satisfied out of the proceeds of the resale) the original decree-holder stand in the position of decree-holders who have obtained judgment against the defaulting purchaser for damages occasioned by his default; the defaulting purchaser stands in the position of a judgment-debtor against whom a decree for such damages has passed. They are parties to the proceeding which is substituted for the suit, and inasmuch as s. 254 declares without exception that the difference in price, which is the amount of the damages, shall be leviable under the rules for enforcing payment of a money-decree, the rule relating to appeals must be applied *mutatis mutandis* equally with any other of those rules.

[189] Having disposed of this plea, the appellants contend the Court is bound to go on to consider the appeal on the merits. The respondents, on the other hand, argue that only the appeal must be confined to the point on which the Judges constituting the Division Bench differed, and in support of their argument they refer to the ruling of the High Court of Bengal in *Roy Nandiput Mahata v. Urquhart* (4 B. L. R., A. C., 181; s.c., 13 W. R., 209).

This ruling came before the Privy Council, but no question arose upon it, and the Right Honourable Committee, while alluding to it, expressed neither dissent from nor assent to it.

The 10th clause of the Letters Patent constituting this Court declares that an appeal shall lie to the Court from the judgment of one Judge of the said Court or of one Judge of any Division Court, pursuant to s. 13 of the High Courts' Act, and that an appeal shall also lie to the Court from the judgment of two or more Judges of the Court or of such Division Court wherever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the Court.

Now there can be no question that, on the hearing of an appeal from the judgment of a single Judge, the whole case may come before the Court in appeal, and it is incompetent to the Court to entertain objections to any part of the judgment, and it is a fair argument that the word judgment must be read in the same sense whenever it occurs in the same section, and that it must be held to mean the whole judgment in the second paragraph as it does admittedly in the first paragraph, unless its sense is restrained by the context. The question then must turn on the construction to be put on the word "wherever." Does it mean "on any point on which," or does it mean "in any case in which." Let us substitute these different meanings for the doubtful term and read them with the rest of the sentence. Adopting the former, the passage will then run "on any point on which such Judges are equally divided in opinion, and do not amount in number to the majority of the whole of the Judges." This construction would, it is clear, accord with the first clause of the sentence, but not with the latter, Adopting **[190]** the other construction, the passage would run "in any case in which the Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges." This construction accords with both clauses of the section. Ordinarily where an appeal is given it must be taken to be a general appeal, and express language should be used to restrict it. For this reason, because the construction of the doubtful term which appears to accord best with the context ought to be accepted, it must be held that the appeal given to the Full Court is not confined to the point on which the Judges of the Division Bench differed in opinion. We have then to consider the objection taken to the judgment of the Division Bench on the merits.*

Spankie, J.—After fuller consideration of the question, I now am of opinion that, when the decree-holder or judgment-debtor proceeds against a defaulting purchaser under s. 254, Act VIII of 1859, the latter must at any rate be regarded as a party to a suit as between himself and the person insisting on the enforcement of the provisions of the section, and therefore, as the proceedings are in execution, there is an appeal under s. 11, Act XXIII of 1861. Another

* The learned Judges eventually directed the Court of First Instance, under s. 356, Act VIII of 1859, to take the evidence of Kali Charan. When this was done and the appeal came on for final hearing, observing that, in their judgment, there was not sufficient evidence to prove that Kali Charan was authorized by the appellants to make the purchase of Tal Ratwi on their behalf and therefore they could not be charged with the deficiency in the price obtained on the resale, the learned Judges decreed the appeal and reversed the decree of the Division Court.

question, however, has been raised during the hearing of the appeal. Is the Court at liberty to go into the merits of this case, or should it have confined itself to the point regarding which the Judges of the Division Bench have differed?

The appeal permitted by cl. 10 of the Letters Patent is from the judgment of two or more Judges or of a Division Court, wherever such Judges are equally divided in opinion. It will be observed that the word *whenever* is not used, but wherever, and cl. 27 provides that when the Judges of a Division Court are divided in opinion as to the decision to be given on any point, *such point* shall be decided according to the opinion of the majority of [191] the Judges, and if the Judges be equally divided, then the opinion of the senior Judge shall prevail. When this happens, the door is opened for an appeal. If the difference of the Division Court has been on a particular point, and on such point the decision of the senior Judge has prevailed, it would seem to follow that the appeal to the Court at large would be confined to that point of difference alone. Then no violence is done to cl. 10, which provides for an appeal from the judgment of one Judge, or from the judgment of two or more Judges, or of the Division Court, wherever such Judges are equally divided in opinion. This seems to refer to the particular point upon which they are equally divided in opinion, and so far cl. 10 and 27 are consistent. "Wherever" also would appear to indicate the point of difference respecting which the Court at large is to pronounce an opinion. When the difference of opinion goes to the entire case, the Court at large in appeal would of course deal with all the questions raised before the Division Bench. When the opinion of the senior Judge has prevailed on any point, the Court on appeal would confine itself to that point alone.

I am fortified in this opinion by the precedents cited in the margin. In

Shahzadi Hajra Begum v. Khaja Hossain Ali Khan, (4 B. L. R. A. C., 86; S.C., 12 W. R., 198). the first case it was observed by the learned Chief Justice,— "In deciding upon the point which the two Judges considered to be the only one before them for decision, there was a difference of opinion. The judgment of the senior Judge, that of Mr. Justice KEMP,

therefore prevailed. An appeal lies to us, because the Judges have differed, and I think that on this appeal it is not now open to the parties to go into the whole of the case and to raise before us points which were not raised before the

Roy Nandipat Mahata v. Urquhart, (4 B. L. R. A. C., 18; S.C., 13 W. R., 209). Judges of the Division Bench" (4 B. L. R., A. C., at p. 101; 12 W. R., at p. 499). In the second case the

ruling that in appeal under the Letters Patent no point can be argued except a point on which the two Judges of the Division Bench have differed [192] in opinion. The Officiating Chief Justice remarked—"The 36th clause of the Charter of 1865 provides 'that if the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, but if the Judges shall be equally divided, then the opinion of the senior Judge shall prevail.' The point on which the learned Judges differed was whether the appellant proved that there had been any material injury by reason of the irregularity. The 15th section gives an appeal from the judgment of two Judges, wherever such Judges are equally divided in opinion. In the case of *Shahzadi Hajra Begam v. Khaja Hossain Ali Khan*, which has already come before the Chief Justice and two Judges, on the construction of s. 15, it has been determined that an appeal only lies in respect of that part of the judgment upon which the two Judges differ" (4 B. L. R., A. C., at p. 193; 13 W. R., at p. 212).

The third case (7 B. L. R., 730) was before Mr. Justice MACPHERSON on the petition of the Court of Wards on behalf of the Rajah of Darbhanga. I cite it to show that that learned Judge, who was a party to the first judgment quoted, had not changed his opinion. He remarks that "it is most desirable and fit that, under the peculiar circumstances of this case, the appeal should now lie to the Privy Council, and not to the High Court. The Division Court decided to a certain extent in favour of the present petitioner; and to that extent the Judges were not divided in opinion. There being no appeal under cl. 15 from that portion of the decree, Rajah Lilanand Singh has appealed to the Privy Council, as he has an undoubted right to do" (7 B. L. R., at p. 736). Accepting the decisions quoted as authority on the point, and also for the reasons assigned by me, I am of opinion that the Court was not at liberty to go into the merits of this case, but should have confined itself to the point of difference between the two Judges of the Division Bench.

Entertaining this opinion, I do not think it necessary to go into the evidence. I would merely remark that I am of the same opinion as I was at the hearing of the appeal, that the evidence was in favour of the appellants.

NOTES.

[The judgment of Shephard, J. in (1895) 18 Mad., 439 discusses this question with reference to legislative enactments; while the Madras High Court in 18 Mad., 439 (distinguished in 23 Mad., 73) and the Calcutta High Court in 16 Cal., 535 followed this case, this case was not followed in 12 All., 397 and was overruled in 14 All., 201 F. B.]

[193] CRIMINAL JURISDICTION.

The 11th May, 1876.

PRESENT :

MR. JUSTICE PEARSON.

Queen

versus

Gur Baksh and others.

Act X of 1872, ss. 467, 468, 469, 471—Prosecution—Procedure.

Section 471, Act X of 1872, does not deprive the Court, which possesses the power of trying an offence mentioned in ss. 467, 468, and 469, of the power of trying it when committed before itself.*

THE petitioners in this case gave evidence on behalf of certain persons who were accused of assault and robbery and pleaded an *alibi*. The accused persons were convicted, and the Magistrate who tried them then tried the petitioners for giving false evidence, under s. 193, Indian Penal Code, and convicted them. His order was affirmed by the Court of Session on appeal.

The petitioners applied to the High Court for a revision of the Magistrate's order on the ground that, under s. 471, Act X of 1872, he was not competent to try them himself, being the Court before which the offence was committed.

* So held in *Queen v. Jagat Mal* (I. L. R., 1 All., 162); contra see *Queen v. Kultaran Singh*, (I. L. R., 1 All., 129).

Mr. L. Dillon, for the Petitioners.

The Junior Government Pleader, Babu Dwarka Nath Banerji, for the Crown.

Pearson, J.—Section 471 of the Code does not expressly prohibit the procedure adopted by the Magistrate in this case, and unless it does so, it is not contended that he was not competent to adopt it. What that section does is only to authorize any Court, Civil or Criminal, which is of opinion that there is sufficient ground for inquiring into any charge such as one under s. 193, Indian Penal Code, after making necessary preliminary inquiry, either to commit the case itself, or to send the case for inquiry to any Magistrate having power to try or commit for trial the accused person for the offence charged. This provision is very necessary for a Court not having power to try the offence itself, as for instance a Civil Court, but does not necessarily deprive a Magistrate of any power which he may possess to try the case himself. I therefore decline to interfere in the present case and reject this petition.

NOTES.

[See 1 All., 625 F. B.]

[194] FULL BENCH.

The 22nd May, 1876.

PRESENT :

SIR ROBERT STUART, K.T., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, MR. JUSTICE SPANKIE, AND MR. JUSTICE OLDFIELD.

Ratan Kuar and others.....Defendants

versus

Jiwan Singh and others.....Plaintiffs.*

*Redemption of mortgage—Burden of proof as to ownership—Act I of 1872,
s. 110—Partial relief.*

The plaintiffs, averring that their ancestor had mortgaged three villages to the ancestors of the defendants in 1842 for Rs. 2,500, putting the mortgagees into possession, sued to recover possession of 15 biswas of each village, asserting that the mortgage-debt had been redeemed from the usufruct. The defendants, admitting the proprietary title of the ancestor of the plaintiffs to the villages, alleged, as to 10 biswas of each village, that they were sold to their ancestors in 1842, by him for Rs. 1,250; and, as to the other 10 biswas of each village, that they were subsequently mortgaged to their ancestors by him for Rs. 14,000, borrowed by him from them for the purpose of defending a suit arising out of the previous sale, which sum had not been satisfied from the usufruct.

Held (STUART, C.J., dissenting), that the burden of proving the mortgage of the 10 biswas of each village of which the defendants alleged the sale, lay on the plaintiffs.†

Per STUART, C. J., *contra*.

Held also (STUART, C. J., and TURNER, J., dissenting), that the plaintiffs having failed to prove the averments on which their suit was based, were not entitled to any relief in

* Appeal under cl. 10, Letters Patent, No. 5 of 1875.

† See besides the cases cited *post*, *Balaji Narji v. Babu Devli*, (5 Bom. H. C. R., A. C. 159); and *Rughoonath Rai, v. Chundo Lall*, (H. C. R., N.-W. P., 1867, p. 395).

respect of that portion of the property in suit of which the defendants admitted their possession as mortgagees.

Per STUART, C.J., and TURNER, J., contra.

THE plaintiffs in this suit, heirs of Tej Singh, alleging that their ancestor had in 1842 mortgaged three villages to Kirat Singh and Moti Singh, the ancestors of the defendants, for Rs. 2,500, claimed possession of 15 biswas of each village, deducting 5 biswas, the share of a heir who did not join in the suit, on the ground that the mortgage-debt had been satisfied from the usufruct. They also claimed mesne profits. The suit was instituted on the 19th April 1873.

The defendants alleged, as to 10 biswas of each village, that Tej Singh had sold them in 1842 to their ancestors for Rs. 1,250; [195] as to the remaining 10 biswas of each village, that the said ancestors had been put into possession thereof by Tej Singh, by way of mortgage, on account of a sum of Rs. 14,000, which he had borrowed from them, in order to defend a suit arising out of the above-mentioned sale, and for other purposes; that that sum had not yet been recovered from the usufruct of those 10 biswas; and that the claim of the plaintiffs, to the extent of the property sold, was barred by limitation, as they, the defendants, had been in adverse possession thereof for upwards of 12 years.

It appeared that Tej Singh died on the 5th September 1860, up to which date his name had been recorded as lambardar and as proprietor of the villages. On the 21st October 1860, the general agent of the defendants objected to the names of Tej Singh's heirs being recorded as proprietors, asserting before the tahsildar the title and possession of the defendants under the sale and mortgage. The plaintiffs having applied that their names might be recorded, alleging that Tej Singh was in proprietary possession of the property up to the day of his death, and denying the sale and mortgage, their application was allowed by the Deputy Collector, but on appeal, by an order made in April 1861, which recognized the possession of the defendants, the Collector reversed his subordinate's order, and directed that their names should be recorded as lambardars. The Collector's order was subsequently affirmed by the Commissioner.

The Court of First Instance held that, as the defendants admitted the title of the ancestor of the plaintiffs, they were bound to prove the sale and mortgage: and holding that they failed to do so gave plaintiffs a decree. With reference to the plea of limitation, it held that the claim of the plaintiffs was within time, taking the date of the Collector's order as the period from which the possession of the defendants could be considered adverse.

On special appeal by the defendants to the High Court, the plea of limitation was again raised, and it was also contended that the burden of proof was wrongly thrown on the defendants.

The Judgment of the Court (STUART, C.J., and OLDFIELD, J.), so far as it was material to the grounds of appeal above set out, was as follows:—

[196] On the first ground of appeal we are of opinion that there is not such a clear adverse possession by the defendants, appellants, for 12 years, as will bar this claim.

Though the defendants assert their purchase to have been made in 1842, yet there is no very clear evidence of their possession under it till Tej Singh's death, for up to that time he continued to be recorded in the revenue records as proprietor, and there is no evidence of any acts of proprietorship on the part of defendants betokening possession. They have produced some dakhilas, or receipts

for revenue, in their names for 1841, but these are prior to the alleged sale, and made by them as lessees, and there is no other material evidence, except some entries in certain papers, one copy of a khewat of 1268 Fasli or 1856 (No. 103 exhibit), where it is entered that Kirat Singh is in possession as purchaser, and similar entries in certain nikasis: these may be of use to support the sale, but not sufficient to support the averment of a possession under the sale adverse to the plaintiffs. We then come to the time of Tej Singh's death, 5th September 1860, and find that, on the 21st October, the defendants, through their agent, Parshadi Lal, applied for matation of names in their favour, and set up their title under sale and mortgage as now claimed, but the plaintiffs' ancestors at once disputed their title. The Deputy Collector found the plaintiffs were entitled to have their names recorded, but the Collector reversed this order, and entered the names of the defendants' ancestors in the column of manager, or lambardar, and this order was affirmed on appeal to the Commissioner. Since the last order was passed the plaintiffs appear to have taken no steps against the defendants till the suit was brought, and from that time the possession held by defendants may properly be considered adverse to the plaintiffs, but not so from the time during which their title was in dispute in litigation, and 12 years have not run so as to bar this claim.

It has also been contended that the three years' limitation will apply to this suit, but this is not so, as there was no such award by the revenue authorities in 1860 as is contemplated in the Limitation Act. We now take the last plea in appeal, as to the burden of proof. It is of the utmost importance in this case, as the [197] evidence on both sides is so unsatisfactory, and the cases of both parties so full of inconsistencies, that the case will be determined mainly by the determination of this point.

There is no dispute that Tej Singh, through whom plaintiffs claim, was originally owner, and, *prima facie*, the burden of proof to show the present proprietary or mortgage possession of defendants will be on them; but this burden can be shifted if the defendants show that they have ostensibly for a length of time been in possession under the titles they now set up, and we think that is the case here, and that the Subordinate Judge has wrongly put the onus on them.

It is shown that on Tej Singh's death in 1860 they set up the very same titles to the estates that they do now, and that they were held by the higher revenue authorities to be in possession under such titles (*see* the Collector's order) and their possession has ever since continued, that is, for very nearly 12 years. Under such circumstances, the plaintiffs can now only succeed by proving their averments that the defendants hold under a mortgage of the entire estates for Rs. 2,500 executed in 1842. (The learned Judges, holding that the plaintiffs failed to prove these averments, dismissed the suit.)

The plaintiffs applied for a review of judgment on the ground that, as to the 10-biswa share in each village of which the defendants admitted they were mortgagees, no proof of their title was necessary, and, as to the remaining shares, that the burden of proving the sale alleged by the defendants lay on them. The application was admitted by STUART, C.J., OLDFIELD, J., dissenting.

The Judgments of the learned Judges in review of their former judgments were as follows:-

Stuart, C.J.—I have repeatedly and anxiously considered this case since the argument in review of our first judgment was addressed to us, and I have also had the advantage of perusing the opinion of my colleague, Mr. Justice

OLDFIELD, but I cannot concur in his conclusion. The plaintiffs' ancestral and hereditary right is undoubtedly, it is admitted, while the defendants' story is, to my mind, very doubtful, if not suspicious, and on this broad view of the case I hold the burden of proof is on the defendants. The [198] facts are not the same as those in the Privy Council case referred to (*Valoji Krishnan Gopalar v. Nayana Chetti*, 10 Moore's Ind. App. 151). Their clear actual possession for forty-four years was satisfactorily shown on the part of the defendants, and on the simple intelligible statement that they had held such possession as purchasers under a deed of sale to one of their ancestors : the plaintiffs, on the other hand, alleging that the defendants' possession had been that of usufructuary mortgagees. But whatever the origin of the possession, the fact of it for forty-four years was undoubted, and the burden of proof was therefore justly put on the party who alleged an hereditary title against the defendants.

Here the circumstances are not quite the same. The defendants show, indeed, or rather suggest, their ostensible possession since 1842, but I think we must take it as a fact that their possession from that year till 1860, when Tej Singh died, was the possession of mortgagees, and therefore was not adverse to the plaintiffs. But it was not till the 19th April, 1861, that their possession was recorded, so that the defendants can barely show 12 years of absolute or clearly adverse possession ; in fact, the 12 years had not expired when the present suit was instituted. Then the defendants' plea of possession, such as it is, is accompanied by statements of a very doubtful, and even, as I have said, of a suspicious nature ; and their suggestion respecting the sale to their ancestors of a 10-biswa share for Rs. 1,250 is scarcely credible, and is certainly inconsistent with their other statement that the other 10-biswa share had been mortgaged to them for Rs. 14,000. Generally, I agree with the Subordinate Judge in his view of the facts so far as we know them, and I consider the plaintiffs' statement the more reasonable of the two, and their hereditary title is undisputed. On the other hand, the defendants' account of the origin of their possession is so doubtful and even improbable, as respects both its character and duration, that it ought not, in my opinion, to be allowed to shift the burden of proof from their shoulders to those of the plaintiffs.

Therefore, holding that the burden of proof is on the defendants, I would affirm the judgment of the Subordinate Judge, in which I substantially concur, and dismiss the appeal with costs.

[199] **Oldfield, J.** (who, after stating the facts, continued) :—The plea of limitation in bar by adverse possession urged by the defendants has no weight, for the plaintiffs' suit is to redeem a mortgage, and they can sue any time within 60 years. Long ostensible possession on the part of the defendants as owners would throw the burden of proving the mortgage on the plaintiffs ; but it would not be adverse so as to bar the institution of the suit for redemption ; and the plea of three years' limitation also fails, as there has been no award by the revenue authorities in 1860, such as is contemplated in the Limitation Act. But in my opinion the lower Court has wrongly placed the burden of proof on the defendants. The plaintiffs' ancestors are admittedly the original owners of the estate, but it is very clear that the defendants' ancestors have held possession at least since 1842 up to the present time : the plaintiffs admit so much, ascribing it to the mortgage. This possession the defendants ascribe to sale of half the estate and mortgage of the remainder, but however this may be, possession on their part from 1842 is clear, and since 1860, if not before, this possession by them has been openly held under the titles they now set up. Tej Singh died on 5th September, 1860, and defendants, through their agent, Parshadi Lal, applied for mutation of names in their favour, averring they had

purchased half the estates, and become mortgagees of half in the same way as they contend in this suit; the plaintiffs' ancestors disputed their titles, but the Collector, on 19th April, 1861, recorded the defendants' names as being the parties in possession, and since then the plaintiffs have not taken any steps against defendants till this suit was instituted.

It appears to me that, in the face of this lengthened possession of the estates by defendants, the plaintiffs can only succeed by proving the mortgage which they sue to redeem, and the ruling of the Privy Council in *Valoji Kristnan Gopalar v. Nayana Chetti* (10 Moore's Ind. App. 151) I think supports this view.

The defendants appealed to the Full Court against the judgment of STUART, C.J., under cl. 10 of the Letters Patent, on the ground that the burden of proof should have been thrown on the [200] plaintiffs; and that the plaintiffs failed to prove the mortgage under which they claimed.

Babu Oprokash Chandar (with him the Junior Government Pleader, Babu Dwarka Nath Banerji, and Pandit Ajudhia Nath), for the Appellants.—It is admitted that the defendants are in possession of the property in suit and have been so for upwards of 30 years. Since 1860, at the least, they have been in possession under the titles now set up. As to the moiety of the property therefore which they say was sold to them, the burden of proving their qualified ownership lies on the plaintiffs—s. 110, Act I of 1872; *Sheoruttun Gir v. Doorga* (H. C. R., N.-W. P., 1874, p. 36). In view of their long enjoyment of possession the plaintiffs cannot succeed in their suit unless they prove the mortgage which they sue to redeem—*Valoji Kristnan Gopalar v. Nayana Chetti* (10 Moore's Ind. App. 151). This they have failed to do.

Mr. Howard (with him Pandit Bishambar Nath), for the Respondents.—The cases cited and the present case are distinguishable. In the present case there was no ostensible possession by the defendants as owners of the moiety of which they allege the sale. They were recorded as managers only. There has been no adverse possession of the moiety for 12 years. They admit their possession as mortgagees of half the property. The plaintiffs are entitled to relief in respect of this portion, and the amount of the mortgage-debt should be determined.

Pearson, J.—As regards the 10-biswa share which is said to have been sold by Tej Singh to Kirat Singh more than 30 years ago, and which is undeniably in the possession of the defendants, it appears to me that s. 110* of the Law of Evidence (Act I of 1872), entirely supports the first ground of the appeal before us. It is, therefore, scarcely necessary to refer to the doctrine laid down by the Privy Council in the case to be found at p. 151, vol. 10, Moore's Ind. App. (*Valoji Kristnan Gopalar v. Nayana Chetti*). The law declares that "when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner." The plaintiffs are then clearly bound by the law to prove that the defendants are not the owners of the 10-biswa [201] share in their possession, and we have to consider whether they have discharged the burden thus imposed upon them. I hold that they have not done so, being of opinion that the evidence adduced by the defendants in proof of the sale alleged by them is more weighty and trustworthy than that which the plaintiffs have brought forward to substantiate their assertion of a mortgage

*[Sec. 110:—When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.]

having been made of the three entire mahals in 1842 for Rs. 2,500. I am further of opinion that, although the suit as brought in respect of this portion of the claimed property is not barred by the law of limitation, the plaintiffs are nevertheless precluded from recovering possession of it by the fact that the defendants have held adverse possession of it for more than 12 years. For it appears in evidence that, on the 21st October, 1860, the defendants publicly asserted their title by purchase to a moiety of each of the mahals by applying to the Revenue Department for the recognition and registration of their title and possession, and in my judgment their possession must not be reckoned as adverse only from the 19th April, 1861, the date of the order passed on their application by the Collector in appeal, but at least from the date on which their title as purchasers was openly set up in the face of Tej Singh's heirs. From this point of view their possession had certainly become adverse to the latter more than 12 years before the date of the institution of the present suit.

It remains to deal with the remaining portion of the claim, in respect of the 5-biswa share of each of the three mahals admitted by the defendants to be held in mortgage by them in lieu of Rs. 14,000, and to be redeemable on payment of that amount. The allegation on which the suit was brought, that the entire mahals were mortgaged for Rs. 2,500, an allegation quite inconsistent with that made by the plaintiffs, or those whom they represent, in 1860, has broken down; and it appears to me that we should not be warranted by the evidence on the record in ruling that the 5-biswa share now in question was redeemable whenever Rs. 625—a fourth part of Rs. 2,500—had been recovered with interest from the usufruct, and has been accordingly redeemed. The plaintiffs must establish their right to re-entry, but they have failed to prove that they are entitled to re-entry, on any other terms than those stated by the defendants. I would therefore restore and [202] affirm the decision of the Bench, dated the 16th June, 1874, and decree this appeal with costs.

Turner, J.—That the appellant and her predecessors in title have held possession of the property in suit for upwards of 12 years is virtually admitted by the respondents and is abundantly proved. It is shown that in 1860 they opposed the entry of the names of Tej Singh's heirs in the revenue registers, on the ground that they were in possession, and in April, 1861, the Collector allowed their objection and ordered their names to be entered. Although they did not ascribe the same date to the origin of their title, they virtually asserted the same title as that on which she now relies. She now claims one moiety of the property under a sale effected by Tej Singh in favour of Kirat Singh in 1842, and she alleges that, legal proceedings having been instituted to contest the right of Tej Singh to sell the property, debts were incurred by Tej Singh to Kirat Singh, and that the other moiety of the estate was in consideration of these debts "made over in possession" to Kirat Singh. The phrase used respecting this last transaction is somewhat ambiguous both in the written statement filed by the appellant and in other proceedings, but the case was argued on the hypothesis that the alienation of the second moiety of the property was of the nature of a mortgage and not an absolute sale. In their petition filed in the Revenue Office on the 26th December, 1860, the heirs of Kirat Singh alleged they were in possession by virtue of sale and mortgage effected by Tej Singh in their favour. In their appeal to the Collector they alleged that in 1839 the estate was mortgaged and sold by Tej Singh to Kirat Singh and Moti Singh, their ancestors. This appears from the Collector's decision, dated the 20th February, 1861. Moreover, the witnesses they have produced in this suit were called to speak to a sale of one moiety of the property and to a mortgage of the other moiety. I see no sufficient ground for the suggestion, that, although

the property was nominally mortgaged, it was not intended it should be redeemed.

The appellant asserts that whatever documents of title she possessed were lost when Kirat Singh's house was plundered in the mutiny, and the kanungo who appears to be impartial con-[203]firms her statement that the residence was destroyed in the manner stated by her. Now, inasmuch as possession of Kirat Singh and his heirs for so long a period has been proved, the presumption that they were in possession as proprietors must be rebutted. In respect of one moiety it is rebutted by the admission and proof that their possession was that of mortgagees. But in respect of the other moiety which they claimed to hold as purchasers the respondents must adduce evidence to rebut the presumption arising out of possession or must fail. The circumstance that one moiety of the property is admittedly held under mortgage might lend corroboration to evidence, if there was any, that Kirat Singh's heirs held entire property as mortgagees, but by itself it will not relieve the respondents from the burden of rebutting the presumption arising from the possession of Kirat Singh's heirs. No reliable evidence has been produced by them. The witnesses called by either party to speak to the contents of deeds executed so many years ago would in this respect be untrustworthy, even if it were proved that they were at the time made acquainted with the contents of the deeds which from the position in life of some of them is hardly probable. They may, or rather some of them may, have been present when the deeds were executed, and if they were present they may be able to recall the fact of the execution of the deeds, but it would be unsafe to accept their testimony beyond this point.

Putting aside the parol evidence, there remains the circumstance that Tej Singh's name was retained in the revenue registers as proprietor up to the time of his death. The appellant seeks to explain this by asserting that Tej Singh's title to the estate was disputed by one Daulat Singh, in the name of whose ancestor Tej Singh had purchased in *ismfurzi*, and that, in consequence of proceedings taken by Daulat Singh, the entry of Kirat Singh's name in respect of the 10 biswas purchased by him was postponed. That Tej Singh's title was in fact disputed by Daulat Singh is shown by the petition of Jiwan Singh, Himmat Singh and Mussammat Radha, when as the heirs of Tej Singh they applied in 1860 to have their names recorded in the registers. But to whatever cause the retention of Tej Singh's name may have been due, this circumstance would not by itself warrant the conclusion that the [204] possession of Kirat Singh's heirs was merely that of mortgagees. The claim then for one moiety of the property must be dismissed. The question arises whether the respondents, although they have failed to prove that the whole estate was mortgaged, should be allowed any relief in this suit? The circumstances are peculiar; the appellant admits that she holds one moiety of the property claimed by way of mortgage; ordinarily a deed would have been executed creating such an interest. Now she does not produce any mortgage-deed. She avers that large sums were expended in defending the sale of one moiety of the property and that other sums were advanced to the original proprietor, and that in consideration of these expenses and advances, which altogether are said to amount to a sum wholly disproportionate to the sum alleged to have been paid for one moiety of the property, the other moiety of the property was made over to Kirat Singh. That it was transferred to Kirat Singh by absolute sale is not asserted, and, as has been pointed out, in 1860 it was admitted that the title to a portion of the property was in virtue of mortgage, and, on the hypothesis that the mortgage was admitted, the case was argued at the bar.

The appellants do not state at what date this assignment was made. The sale of the one moiety is ascribed to the year 1842, the date assigned by the respondents to the mortgage of the entire village. If the assignment of the other moiety was made for the consideration alleged by the appellant, it must have taken place some years after the sale. In 1860 the dates ascribed to the sale and mortgage were the year 1839. There is some slight evidence in the revenue proceedings to show that Kirat Singh held a mortgage of the estate before 1842, and it is apparent from the circumstance that in 1860 the appellant alleged her title originated in 1839, that she is uncertain of the date on which the assignment of the second moiety was made. It is possible that a mortgage subsisted prior to 1842; that in 1842 that mortgage was paid off, and one moiety of the property sold to Kirat Singh; and it is not improbable that subsequently the second moiety was mortgaged; and assuming that the title to the second moiety is admittedly founded on a mortgage, I can see no good reason to debar the respondents from having an account taken in this suit of what may be due on the mortgage of the moiety of the estate and [205] of obtaining such relief as they may be found entitled to on the taking of the account. It is impossible to ascribe any date to this mortgage save that it occurred after the sale in 1842 and before 1860. If the respondents are not allowed to obtain relief in this suit, they may hereafter be met with the plea that they ought to have obtained relief in this suit. There are cases in which this Court has allowed mortgagors to recover a portion of the property claimed by them; there are cases in which a mortgagor has asserted the debt to be less than the mortgagee has proved it to be; and nevertheless the mortgagor has been allowed to proceed with his suit, and accounts have been taken and such relief granted as on taking the accounts he was shown to be entitled to. A claim for the whole surely includes a claim for a part, and if the plaintiff fails to prove his whole claim, he may nevertheless obtain such relief as falls fairly within the purview of his claim. Seeing that the parties to this suit are not the persons who were parties to the original transactions, and that whatever documentary evidence existed of those transactions is not now forthcoming, it appears inequitable to require the same correspondence of proofs and allegations which might have been required from persons who were themselves parties to the original transactions. If the respondents are entitled, as in my judgment they should be held to be, to obtain partial relief in this suit, I am of opinion that, in respect of the moiety of the property which is admittedly under mortgage, the burden of proof lay on the appellant. The respondents alleged the mortgage-debt was Rs. 2,500, and that it had been discharged from the usufruct. The appellant alleged the debt was Rs. 14,000, and that a large balance was still owing. She may yet have in her possession accounts to prove the sums advanced, and she must have accounts of the profits of the estate. In my judgment the suit should not be wholly dismissed, but issues should be remitted to ascertain the amount of the mortgage-debt on the moiety held in the mortgage, and to ascertain the amount of profits received by the mortgagee.

Stuart, C.J.--I think there is considerable force in the latter part of Mr. Justice TURNER's judgment, and *pro tanto* I concur in the account and remand he suggests. But I consider that such account and remand might justly be extended to the whole property in suit; and generally, after giving the case the most careful consideration, and hearing all that has been urged before the Full Bench, I am not satisfied that my first judgment was wrong. The question before us is simply on which of the parties the burden of proof is laid, and I remain of the opinion that it is on the defendants.

Anything like adverse possession by them cannot, I think, be considered to have commenced till the 19th April, 1861, and 12 years had not elapsed from that date when the present suit was instituted. The presumptions therefore are all in favour of the plaintiffs, and the defendants must make out their case. I would affirm the judgment of the Division Bench.

Spankie, J.—I am of opinion that the burden of proof in this case was on the plaintiffs. It is true that the ancestor of plaintiffs is admitted to have been the original owner of the property. But the defendants and their ancestors have held possession, as shown by Mr. Justice OLDFIELD, since 1842 up to the present time. This plaintiffs allow, but say that they hold as mortgagees. On the other hand, the defendants have held possession since 1860, and have set up a proprietary title to half the estate since 1860, and contend that they are mortgagees of the other half. Their title was disputed in 1861. But the Collector recorded their names as being in possession. Plaintiffs took no steps to establish their own title until this suit was instituted, in which they claim to have their right declared and full proprietary possession of 15 biswas by redemption of mortgage, asserting that the mortgage had been liquidated from the income of the property. They were bound to establish the mortgage, but they could not produce the deed said to have been executed so far back as 1842, and the parol evidence in support of it is suspicious and unreliable. On the other hand, though the defendants cannot produce a sale-deed, the fact of the sale is supported by the kanungo and by entries in the village papers and statement of proprietary charges for 1263 Fasli. The patwari, too, supports their statement. The witnesses generally are not better than those of plaintiffs. But it is for the former to establish their case, and a weak defence cannot set up a weak claim. I think that the circumstance that on Tej Singh's death, when application was made for mutation of names in favour of the predecessor of plaintiffs, any mortgage was denied, tells against the case of the plaintiffs; and if their statements now are correct the mortgage in 1842 [207] was but for a small term, and mutation of names was not considered necessary, as it was thought that the mortgage would be redeemed from the income in two or three years. Even no attempt has been made to get back the property until this suit was entered.

I think that the appeal must be admitted, and that the suit as brought was, in the first instance, properly dismissed on appeal. Whether, on the admission of defendants that they held as mortgagees of a portion of the property under a mortgage on which a large sum is still due to them, the plaintiffs can claim to redeem that portion after getting an account is another question. I do not think that they are entitled to ask for it in this suit, in which their claim as brought had not been established.

Oldfield, J.—I adhere to the view of this case which I have expressed at length in the previous judgments, and I would restore the judgment and decree of this Court, dated the 16th June 1874, and dismiss the suit with costs in all Courts.

NOTES.

[This case was approved in (1899) 11 All. 498 and 18 All. 408, as regards non-suiting the plaintiff on his failure to substantiate his averments.]

[1 All. 207]

APPELLATE CIVIL.

The 22nd May, 1876.

PRESENT :

MR. JUSTICE PEARSON, AND MR. JUSTICE TURNER.

Raja Ram.....Plaintiff

versus

Bansi and others.....Defendants.*

Pre-emption—Minor—Legal disability—Limitation—Act IX of 1871, s. 7 and sch. ii., 10.

The provisions of S. 7,† Act IX of 1871, are applicable in computing the period of limitation in suits to enforce a right of pre-emption.‡

Where a condition for pre-emption contained in a record-of-rights was intended to take effect at the time of a sale and its language implied that the co-sharers in whose favour it was made were to be persons who were competent at that time to make a binding contract to accept or refuse an offer, no right of pre-emption accrued under the condition to a co-sharer who was a minor at the time of a sale and unrepresented by any person competent to conclude a binding contract on his behalf, whether it was assumed that the condition arose out of special contract or general usage.

Nanoo v. Tirkha (S. D. A. Rep., N.-W. P., 1865, p. 97) observed upon.

[208] Remarks on the right of pre-emption existing in villages in the North-Western Provinces.

THIS was a suit by a co-sharer in a village to enforce his right of pre-emption in respect of a 2-anna share, under a condition for pre-emption contained in the village administration-paper.

The share was sold to the answering defendants, who were strangers, on the 17th January 1870, while the plaintiff was a minor. The plaintiff had no legally-constituted guardian at the time of the sale. His mother was alive and was managing his estate. The share was not offered to him or to any one on his behalf, nor did he or any one on his behalf assert his right of pre-emption

* Special Appeal, No. 132 of 1876, from a decree of the Judge of Gorakhpur, dated the 26th January 1876, reversing a decree of the Subordinate Judge, dated the 20th November 1875.

† [See, 7 :—If a person entitled to sue be, at the time the right to sue accrued, a minor, or insane, or an idiot, he may institute the suit within the same period after the disability has ceased, or (when he is at the time of the accrual affected by two disabilities) after both disabilities have ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed.]

When his disability continues up to his death, his representative in interest may institute the suit within the same period after the death as would otherwise have been allowed from the time prescribed therefor in the third column of the same schedule.

Nothing in this section shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which the suit must be brought.]

‡ So held under Act XIV of 1859 in *Jungoo Lal v. Lalla Alum Chund*, 7 W. R. 279.

at the time of the sale. He became of age in October 1874, and instituted the present suit on the 23rd July 1875.

The Court of First Instance gave him a decree. The lower Appellate Court, relying on the ruling of the Sudder Court in *Nanoo v. Tirkha* (S. D. A. Rep., N.-W. P., 1865, p. 97), held that his right of pre-emption had lapsed for want of its assertion within a reasonable period after the sale. The plaintiff appealed to the High Court against this decision.

Lala *Lalta Parshad* for the Appellant.

The Senior Government Pleader (*Lala Juala Parshad*), Munshi *Hanuman Parshad*, and Maulvi *Mehdi Hussein* for the Respondents.

The Judgment of the Court was as follows :—

The *hagg-i-shuf'a* or right of pre-emption known to the Muhammadan law, and of which some of the expounders of that law declare the operation limited to houses and parcels of enclosed land, had in some instances become a village custom and attached to the alienation of shares in revenue-paying mahals when the first settlement under Regulation IX of 1833 was made in these Provinces. These instances were, we believe, not numerous, but inasmuch as it was deemed conducive to the welfare and tranquillity of village communities that some such provision should be made to prevent the incursion into the community of strangers in race or religion, the officers engaged in the preparation of the record-of-rights induced the proprietors to consent to the introduction of a stipulation binding each co-sharer when transferring his share to [209] give the first refusal of it to one of his own family or to the other co-sharers in the patti or mahal. These stipulations vary in their terms, and while they are not clogged with the formalities which attach to the Muhammadan *hagg-i-shuf'a* they also differ from that right, in that while the latter is regarded by Muhammadan law as a feeble right, the former, arising out of contract, are enforced with the same rigour as contracts.

Unfortunately, the introduction of these restrictions on the freedom of alienation has worked results wholly unexpected, and produced evils scarcely less than those they were designed to avert. So long as land possessed no great value in the market, the consequences were not plainly apparent. Now that land has acquired greater value, and that in some districts there is an active demand for it, the results of these restrictions cannot escape observation.

Except under the pressure of necessity, land-owners rarely part with their landed property. It is, therefore, of the utmost moment to them to obtain its fair value and without unreasonable delay. Now, in a village held by a number of co-sharers it is almost impossible to obtain within a reasonable time from every co-sharer an explicit refusal of an offer of sale, or such evidence of the refusal as will thereafter be incontrovertible. Not unfrequently when a co-sharer desires to sell his share, and in fulfilment of the stipulation offers it to his co-sharers, some one or more of them will neither explicitly accept nor decline the offer, but haggle to obtain it at a price far below its value. When the patience of the seller is exhausted, or the urgency of his need no longer permits delay, he is driven to effect a sale with a stranger, which is followed after the longest delay allowed by law by the institution of one or more suits to enforce the right of pre-emption. The stranger, aware of the risk to which his purchase is exposed, either at once takes account of it by offering less than the property ought to fetch if it could be sold freed from the risk, or retains a portion of the purchase-money until it be seen whether the sale is contested, or, if contested, the result be known. Fictitious considerations are entered in

sale-deeds, fictitious payments made before the registering officers, fictitious receipts executed, and wholesale perjury committed on the one side or the other when the Courts come to inquire into the prices actually paid.

[210] In the case now before us a claim is made which, if allowed, will render the condition for pre-emption still more onerous, and impair still further the value of property to which it attaches. The plaintiff seeks to disturb sales made some years before suit at a time when he was a minor and unrepresented by any person competent on his behalf to conclude a purchase. Having brought a suit within a year from the date on which he attained his majority, he is not barred by limitation from enforcing his claim, and the main question is whether or not the right accrued to him. The Court of First Instance assumed that the right accrued to the plaintiff, notwithstanding his minority, and decreed the claim. The Judge on appeal considered that, inasmuch as no claim had been advanced either by the minor or his mother, who managed her son's property within a reasonable period after the sale, the right was lost. The Judge relied on the decision of the late Sudder Court, North-Western Provinces, in *Nanao v. Turkha* (S. D. A. Rep., N.-W P., 1865, p. 97) in which it was held the nature of a pre-emptive right to be such as to require immediate assertion as a condition essential to its recognition, and that minority will not excuse laches in the assertion of the claim.

In special appeal the propriety of this ruling has been impugned. It does not appear from the report whether the claim which was before the Sudder Court was based on the Muhammadan *hujj-i-shuf'a* or on a special condition in the record-of-rights. Under the Muhammadan law immediate demand is certainly essential, but, as we have said, the formalities which are requisite under that law do not apply to rights of pre-emption created by contract, unless it appear that it was the intention of the parties to attach to the exercise of the right the same formalities as are required by Muhammadan law.

In all cases in which the right is asserted as based on a stipulation entered in the record-of-rights, the terms of the stipulation must be regarded, and those conditions only imposed which the language of the stipulation warrants.

In the case before us the stipulation has been thus translated :—

"Every co-sharer is to the extent of his possession at liberty to [211] alienate his share by sale or mortgage, but at the time of alienation there is this condition, that whoever desires to alienate his share, first of all the nearest co-sharer will be entitled to it, and in the event of his refusal it shall be transferred to the other co-sharers in the other thoke, and when all have refused or do not give the proper price, then a transfer may be made to another (*i.e.*, a stranger), and after that the right of alienation shall belong to no co-sharer."

There is nothing in the language of this stipulation to show that the formalities of the Muhammadan law were attached to the right of pre-emption, nor that the right, if it accrued, would be forfeited if it were asserted at any time within the period allowed by the law of limitation. But, while we cannot support the decree of the Court below on the ground on which it proceeded, we see other grounds which in our judgment justify us in affirming it.

It could not have been the intention of those who framed or accepted the stipulation, that no complete alienation should be made so long as there was a co-sharer in the village under a disability to make a binding contract; and the language of the stipulation so far from supporting militates with the suggestion that there could have been any such intention. The condition was clearly to

take effect at the time of the sale, and its language implies that the co-sharers in whose favour the condition was created were to be persons who were competent at the time to make a binding contract to accept or refuse the offer. The generality of the reservation of right to all the co-sharers of the several classes is controlled by other terms which imply that the option of purchase is to be exercised at the time of the sale, and that it is to be given to those who are competent to accept or refuse it. It is admitted that the plaintiff was at the time of the sale impugned a minor, and it is not alleged that there was at that time any person competent at that time to conclude a contract which would be binding on him.

It follows from the construction we put on the stipulation that the seller was not bound to make the offer to the plaintiff, and that the sales cannot be invalidated by reason of the absence of proof of refusal on his part. We have assumed the stipulation in the record-of-rights arose out of contract, because such we believe to have been the more general origin of these stipulations; but assuming the clause [212] in the record-of-rights to be a record of custom, we are still at liberty to collect its incidents from the terms in which it is recorded. Indeed, were the clause merely a record of custom, and its language were ambiguous, a custom to be a good custom must be reasonable, and we could not hold a custom reasonable which allowed the validity of transfers of property to remain for an indefinite period in suspense.

For the reasons we have stated we affirm the decree of the lower Appellate Court and dismiss the appeal with costs.

[1 All. 212]

FULL BENCH.

The 24th April, 1876.

PRESENT :

SIR ROBERT STUART, K.T., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, MR. JUSTICE SPANKIE, AND
MR. JUSTICE OLDFIELD.

Ghazi and others.....Defendants

versus

Kadir Baksh and another.....Plaintiffs.*

*Extension of decree—Irregularity—Sale in execution—Act VIII of 1859,
s. 257.*

G and *M* obtained a money-decree against *K* in the Court of the Principal Sudder Amin on the 12th December 1864. This decree was reversed by the District Judge, but on the 5th March 1866 the Sudder Court set aside the Judge's decree and ordered a new trial. On the 5th May, 1866, the District Judge affirmed the decree of the Court of First Instance. On the 8th December 1866 the High Court again set aside the Judge's decree and ordered a new trial. On the 14th January 1867, the District Judge again affirmed the decree of the Court of First Instance, and no appeal being preferred, the decree became final. The decree-holders had in

* Special Appeal, No. 1557 of 1874, from a decree of the Subordinate Judge of Allahabad, dated the 25th September 1874, reversing a decree of the Munsif, dated the 24th December 1873.

the meantime taken proceedings to execute the decree dated the 5th May 1866, and from time to time, and finally on the 7th November 1870, they renewed these proceedings, in each instance referring to the decree, dated the 5th May 1866, even after it was set aside and the decree, dated the 14th January 1867, passed. On the last application a sale of certain immoveable property belonging to *K* was ordered, and took place on the 15th February 1871. *K* objected to the confirmation of the sale on the ground of the irregularity in the application, but his objections were disallowed and the sale was confirmed. He brought a suit to recover possession of the property from the auction-purchaser on the ground that the sale was a nullity. *I.L.R. per STUART, C.J., and PEARSON, TURNER, and SPANKIE, JJ.*, that the sale ought not to be set aside, as the irregularity in applying for execution of the decree, dated the 5th May 1866, was an irregularity which did not prejudice the judgment-debtor.

[213] *Per OLDFIELD, J.*—That, with reference to s. 257, Act VIII of 1859, the suit was not maintainable.

THIS was a suit to recover possession of the one-third share of a dwelling-house, being the plaintiff Kadir Baksh's share by inheritance in the said dwelling-house, and to eject the auction-purchaser at a sale of the share in execution of a decree held on the 15th February 1871. It was instituted on the 7th September 1873, and was brought on the allegation that the decree in execution of which the share had been sold had been reversed, and that the sale and all other proceedings relating to the execution were therefore null and void.

The defendant Ghazi, and Mangli, the deceased ancestor of the defendant Zahuran, obtained a decree for Rs. 1,500 against the plaintiff Kadir Baksh in the Court of the Principal Sudder Amin of Allahabad on the 12th December 1864. This decree was reversed by the District Judge on the 28th July, 1865; but on the 5th March 1866, the Sudder Court set aside the Judge's decree and ordered a new trial. On the 5th May 1866, the District Judge affirmed the decree of the Court of First Instance. On the 3rd December 1866, the High Court again set aside the Judge's decree and ordered a new trial. On the 14th January 1867, the District Judge again affirmed the decree of the Court of First Instance, and no appeal being preferred, the decree became final. The decree-holders had in the meantime, on the 12th June 1866, taken proceedings to execute the decree, dated the 5th May 1866. They renewed these proceedings on the 5th July 1866, and again on the 2nd June 1869, referring in each instance to the decree, dated the 5th May 1866. Finally, on the 7th November 1870, they applied for the sale of the property in suit, referring in this application, as in their previous applications, to the decree, dated the 5th May 1866, and stating that the amount which was entered therein as due by the judgment-debtor was due under that decree. A sale of the property was ordered and took place on the 15th February 1871. The notifications of sale stated that the property was for sale in satisfaction of the decree, dated the 5th May 1866. On the 10th March 1871, the judgment-debtor objected to the confirmation of the sale on the ground of [214] the error in the application for execution, but his objections were disallowed, and the sale was confirmed on the 22nd March.

Other properties were at the same time sold under the same circumstances. Kadir Baksh sued to recover these other properties, and obtained a decree in the Court of First Instance. The lower Appellate Court reversed the decree, holding that the error in the application of the 7th November 1870, for the sale of the properties was a mere clerical error which caused the judgment-debtor no substantial injury, and an error which he was bound to have pointed out before the sale. On special appeal, the decision of the lower Appellate Court was reversed on the ground that the reference in the application of the 7th November to the decree, dated the 5th May 1866, was not a clerical error, and that, if it could be held to refer to the decree, dated the 14th January 1867, that application would have been barred by limitation.

In the present suit the Court of First Instance held that the claim was barred by limitation under article 14 (a),^{*} sch. ii, Act IX of 1871. The lower Appellate Court held that the limitation applicable to it was that provided in article 145,[†] sch. ii, Act IX of 1871, that is to say, 12 years. It therefore remanded the suit for a new trial.

On special appeal by the defendants to the High Court, it was contended that the suit was not maintainable, with reference to s. 257,[‡] Act VIII of 1859, and that the clerical error in the application for execution was not a sufficient reason for holding the sale invalid, the judgment-debtor having suffered no substantial injury thereby.

Turner, J. (who, after setting out the facts and referring to the grounds of the former decision of the High Court, continued) :—These two grounds appear to resolve themselves into one ground, or if the date of the decree given in the application of the 7th November 1870 be held to be a clerical error, then the dates of the decree mentioned in the other applications made subsequently to the decree of the 14th January 1867 were clerical errors, and those applications would be sufficient to keep alive the decree. Having succeeded in setting aside other sales, the judgment-debtor [215] has now brought the present suit to set aside the sale of the property in suit.

As I entertain doubt whether the sale ought to be set aside for an error which in no way prejudiced the judgment-debtor, I propose that the case should be submitted to the Full Bench that the propriety of the former ruling may be considered.

Spankie, J.— I concur in the reference.

[Art. 14 (a) :—

Description of suit.	Period of limitation	Time when period begins to run.
To set aside any of the following sales :—		
(a) Sale in execution of a decree of a Civil Court :	One year	... When the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought.]

[Art. 145 :—

Description of suit.	Period of limitation	Time when period begins to run.
For possession of immoveable property or any interest therein not hereby otherwise specially provided for.	Twelve years	... When the possession of the defendant, or of some person through whom he claims, became adverse to the plaintiff.]

[Sec. 257 :— If no such application as is mentioned in the last preceding section be made, or if such application be made, and the objection be disallowed, the Court shall pass an order confirming the sale; and in like manner, if such application be made, and if the objection be allowed, the Court shall pass an order setting aside the sale for irregularity. If the objection be allowed, the order made to set aside the sale shall be final; if the objection be disallowed, the order confirming the sale shall be open to appeal; and such order, unless appealed from, and if appealed from, then the order passed on the appeal, shall be final; and the party against whom the same has been given shall be precluded from bringing a suit for establishing the claim.]

When the order to set aside a sale shall be open to appeal.

When the order to set aside a sale shall be open to appeal.

Pandit Bishamber Nath, for the Appellants.

The Junior Government Pleader (Babu Dwarka Nath Banarji) and *Pandit Ajudhia Nath*, for the Respondents.

The Junior Government Pleader.—The application for execution of the decree, dated the 5th May 1866, was an irregularity, as it was not the proper decree to execute; and inasmuch as the decree-holders sought to recover under that decree a larger sum than was due under it, the irregularity inflicted substantial injury on the judgment-debtor.

Pandit Bishamber Nath.—The sale took place in satisfaction of an existing judgment-debt. The judgment-debtor was not in reality affected by the irregularity. No objection was taken by him in the course of the execution proceedings. The sale was duly notified and conducted.

The Opinions of the Full Bench were as follows :—

Stuart, C.J.—The wrong date given to the decree in the application for execution must have been, I think, not so much a clerical error as a legal mistake on the part of the pleader or other person who prepared the application. But it is a mistake, an innocent mistake perhaps, which clearly appears as such on the face of the record, and which, I think, we are entitled to disregard, being, as the reference suggests, a mere error which in no way prejudiced the judgment-debtor.

Pearson, J.—What is called a clerical error appears to me to have been rather erroneous procedure; but I am bound to admit that the ruling of which the propriety is called in question is not one which on reconsideration I am prepared to maintain, and that [216] the view that the sale ought not to be set aside for an error which did not prejudice the judgment-debtor commends itself to my judgment.

Turner, J.—The decree which Mussannat Zahuran obtained in the Court of the Principal Sudder Amin in December 1864 was affirmed in appeal on the 5th May 1866, and although the decree of the Appellate Court was set aside, and a re-hearing of the appeal ordered in December 1866, the original decree was again affirmed in January 1867. When then the decree-holder in 1869 and in 1870 applied to continue the proceedings in execution which she had commenced in 1866, although she erroneously referred in the heading of her application to the decree of the Appellate Court passed in May 1866, which had been set aside, both the decree of the Court of First Instance subsisted and a decree of the Appellate Court affirming that decree.

The proceedings in 1869 and in 1870 were a continuation of the proceedings commenced in 1866, wherein she had sought to execute not only the decree of the Appellate Court, but the decree of the Court of First Instance, which the decree of the Appellate Court affirmed.

Under these circumstances, it seems inequitable to hold that an innocent purchaser is to be damaged by an error which in no way prejudiced the judgment-debtor, and which, had he thought fit to intervene before the sale was ordered, might easily have been corrected. In my judgment the sale ought not to be set aside.

Spankie, J.—I am of opinion that the error was more than clerical and amounted to a material irregularity, but not to one by which the judgment-debtor could be really said to have been prejudiced, and therefore I do not think that the suit can be maintained.

Oldfield, J.—The application for execution contained this error, that it referred to the decree of which execution was sought as bearing date May 5th

1866, whereas the subsisting decree which alone was capable of execution was of date December 12th, 1864.

[217] Notwithstanding this error in the application, the execution-proceedings were made in effect, though not nominally, with reference to the latter decree, and the irregularity, such as it was, pervaded the entire proceedings in execution, including the publication of the sale, and it was made the ground of an objection to the confirmation of the sale under s. 256, Act VIII of 1859, and the objection was disallowed. This being so, I am of opinion that this suit cannot be maintained with reference to s. 257, Act VIII of 1859.

[1 All. 217]

FULL BENCH.

The 27th April, 1876.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, MR. JUSTICE SPANKIE, AND MR. JUSTICE OLDFIELD.

Tajuddin Khan..... Defendant

versus

Ram Parshad Bhagat..... Plaintiff.*

Act XVIII of 1873, s. 93, cl. (a)—Bhuoli—Money-equivalent—Rent—Revenue Court—Civil Court—Jurisdiction.

Held (PEARSON, J., dissenting), that a suit for the money-equivalent of arrears of rent payable in kind is a suit for arrears of rent within the meaning of s. 93, Act XVIII of 1873, and therefore cognizable by a Revenue Court.

Per PEARSON, J.—Such a suit, being a suit for damages for a breach of contract, is cognizable by a Civil Court.

THIS was a suit to recover Rs. 29-1-2, being the market-value of the plaintiff's share in the produce, for the years 1278, 1279, and 1280 Fasli, of two bighas, two biswas, and 17 dhurs of land situated in patti Ram Dihal Rao. The defendant denied that he was a tenant, alleging that he was a co-sharer with the plaintiff in the patti and that the land was his sir-land. The Revenue Court of First Instance found that the defendant held the land as a tenant, and gave the plaintiff a decree. The first Court of Appeal held that the suit was barred by s. 106, Act XVIII of 1873, and that the land was the defendant's sir-land, and dismissed the suit. The second Court of Appeal agreed with the Court of First Instance and also gave the plaintiff a decree.

On appeal to the High Court by the defendant, the Court (PEARSON and TURNER, JJ.), with reference to the second ground **[218]** taken in the memorandum of appeal, viz., that a suit for the value of grain was not cognizable by the Revenue Court, referred to a Full Bench the following question :—

" Whether, when rent is payable in grain, it is competent for the landlord to sue in a Revenue Court for the equivalent in cash ? "

* Special Appeal, No. 1018 of 1875, from a decree of the Judge of Ghazipur, dated the 28th June 1875, reversing a decree of the Collector, dated the 28th January 1875.

Munshi *Hanuman Parshad* (with him the Senior Government Pleader, Lala *Jivala Parshad*) for the Appellant.—There is express provision made in s. 43, Act XVIII of 1873, for the recovery of rent payable in kind. The other provisions in the Act relating to rent are applicable only to rent payable in cash. The provisions of s. 50, for instance, as to the deposit of rent in Court, are not applicable, nor are the provisions as to distress. The suit is a suit for damages, the value of the produce to which the plaintiff was entitled being the measure of the damages, and is cognizable by a Civil Court.

Pandit *Bishambur Nath* for the Respondent.—It was never suggested that the suit was not cognizable by the Revenue Court until it came up in special appeal. Whether the rent is paid in cash or in kind, the provisions of Act XVIII of 1873 are applicable generally. The provisions of s. 56 and of s. 24 are applicable in either case. He referred to *Lachman Parshad v. Holas Mahtoon* (2 B. L. R., App. 27; S. C., 11 W. R., 151).

Stuart, C.J.—The referring order in this case is as follows:—

"Whether, when rent is payable in grain, it is competent to the landlord to sue in a Revenue Court for the equivalent in cash," and the second plea in appeal to which our attention is directed is in these terms:—"The decision is bad in law: the present action for the value of grain was not cognizable by the Revenue Court." The reference, therefore, goes further than the bare question whether the money-equivalent of a grain-rent can be sued for in the Revenue Court. The reference also assumes that the rent agreed to be paid by the defendant was a grain-rent, or a rent payable in kind. But the suit is for arrears of rent, Rs. 29-1-2, being the price or money-value of the grain from 1278 to 1280 Fasli, and this suit is brought in the Revenue Court.

[219] If the question had simply been, as put in one portion of the referring order, whether, when rent is payable in grain, it is competent to the landlord to sue in a Revenue Court for the equivalent in cash, I would have no hesitation in answering it in the negative. But the second plea in appeal to which the referring order directs our attention raises the question in a simple form. By s. 3 rent is defined to mean "whatever is to be paid, delivered or rendered by a tenant on account of his holding, use, or occupation of land": by which I understand to be meant that the contract or agreement for rent may be either that it be paid in money or delivered in kind or by services to be rendered. It does not mean that the rent may be satisfied in any one of these three ways, or that the tenant is to be at liberty to substitute one mode of compliance with his agreement for another; in other words, the definition does not mean that where the rent is a grain one it can be either claimed or recovered in money. The other provisions of the Rent Act to be considered are s. 93, which provides that no Courts other than Courts of Revenue shall take cognizance of the disputes in matters therein mentioned, and the very first there mentioned are "suits for arrears of rent on account of land." We thus see in the first place that a grain-rent is a good rent according to the Rent Act, and is recoverable as such, and in the next place that a suit for "arrears of rent" is exclusively cognizable by the Revenue Court. There is, however, no explanation given in the Act as to what these arrears may be, or whether, in regard to any particular form or kind of rent, the arrears meant by this section are arrears of the same kind or form of rent; in other words, whether, in the case of a grain-rent, the arrears here intended are arrears in grain or according to their value in money. There could, of course, be no difficulty where the stipulated rent is a money one, and a suit for a year's rent in grain brought immediately upon the rent becoming due could be easily worked out to decree,

which would be for the delivery of the stipulated quantity of grain. But the claim made in the present case is not only for arrears of rent, but for arrears to be made good not in grain, but in money. Such a claim in the form of damages could, of course, be made in the Civil Court. But is such a claim for rent to be sued for in the Revenue Courts? In other words, is the suit in the present case a proper application of s. 93 of the [220] Rent Act? It would almost appear to be not. But, on the other hand, there are difficulties. It is not easy to understand how arrears of grain-rent can be recoverable at all, or can be even made intelligible excepting in regard to their money-equivalent. I observe that the Assistant Collector refers in his judgment to certain decrees which had been obtained by the plaintiff against his tenants for arrears of rent, and it would have been desirable to have seen these decrees. If the rent in those cases was also a grain one, what did those decrees, being decrees for *arrears*, give the plaintiff? Did they decree the arrears in grain, leaving the rest to the execution department, or did they directly decree in money? It would have been interesting to have known this. But we must dispose of this reference as best we can on the papers before us. Supposing a decree for arrears of rent payable in grain, how can such a decree be executed by the Revenue Court? Strictly it ought to be a decree for specific performance. But how can there be specific performance with respect to arrears of a grain-rent extending over several years; and what kind of grain is to be delivered at the end of the period? Not surely and specifically the particular grain which alone can be had at the end of the period? Thus, in the present case, the claim is for arrears for 1278 to 1280 Fasli. Would the delivery for the whole period of the grain of 1280 be valid performance on the part of the defendant? Unless there be some facilities, of which I am not aware, in the execution department for conversion into money, serious difficulties present themselves to my mind against such procedure. Mr. Justice PEARSON, with reference to the summary procedure provided by s. 43 of the Act without having recourse to a regular suit, very pertinently remarks that such a suit "would be of little use if the tenant had already appropriated and dissipated the whole crop." No doubt, unless you allow the landlord to sue for the money-equivalent for the produce, a suggestion which appears to me to be pregnant with some relevancy to this reference. This s. 43, it will be observed, does not enact that if a landholder does not avail himself of it he shall have no other remedy; nor does it follow that because this section has not been acted upon, therefore the landlord may not fall back upon s. 93 and sue in the Revenue Court for his arrears. On the whole, the conclusion would seem to be that, as suits for arrears of rent are exclusively cogniz-[221]able by the Revenue Court, they can only be so where grain is the rent, either by the claim for a money-equivalent being allowable in them, or by the decree in them being made capable of being satisfied in money; otherwise it seems to me that a suit for arrears of a grain-rent can in no case be instituted in a Revenue Court and that s. 93, therefore, has no application to such a suit. But this would be a conclusion rather too violent. I have little doubt that the intention of the legislature was to give every reasonable facility for recovery of such arrears as are mentioned in s. 93, and I think we may help that intention by holding that conversion into or recovery in money is such a reasonable facility and that such recovery may either be made by a claim to that effect in the plaint, or by allowing the decree to be executed to the same effect.

It is not without doubt and hesitation that I have formed this opinion, but it suggests a view of the question before us which appears to me to be the only one that can possibly be entertained, unless we hold that, in no case, can arrears of rent in grain be recovered in a Revenue Court, s. 93 notwithstanding.

The argument maintained in the judgment of my honourable and learned colleague, Mr. Justice TURNER, is unfavourable to the jurisdiction of the Revenue Court, but he says that suits of this nature have for a very long period been regarded as suits for rent, and tried in the Revenue Courts, and he points out that in Mr. Thomason's Directions to Revenue Officers such suits are mentioned as cognizable by the Revenue Courts. These may be very proper considerations, although I must remark that Mr. Thomason's work, however useful, is not a legal authority, and I could not allow it to influence my mind on the law of any case.. What I go upon is not so much the habits or customs of the authorities in such matters, or the sentiments or ideas contained in Revenue Books, as our duty to recognise the legal necessities of the Rent Act, and to make the law and procedure provided by it reasonably practicable and available for the purposos for which the Act was enacted. My answer, therefore, to this reference is in the affirmative.

Pearson, J.—The question referred to us for determination must, in my opinion, be answered in the negative. If a tenant agreed to make over to his landlord a certain portion or proportion [222] of the produce of the holding, or the money-value thereof according to market-rates, as rent, a suit for the recovery of the rent in either form might doubtless be brought. But the question referred to us imports or implies that the rent is payable in grain only ; and this being so, it is impossible to hold that the money-value of the grain is the rent which the landlord is entitled to demand. What is really sought in this suit is not the stipulated rent, but an equivalent for it ; or, in other words, damages for the tenant's breach of contract by having failed to pay it. A suit for damages on account of such a breach of contract would be not in the Revenue, but in the Civil Court, and the period of limitation applicable to such a suit would not be the same as that which applies to a suit for arrears of rent under s. 94, Act XVIII of 1873. Section 43 of that Act provides a mode whereby, whenever rent is taken by division of the produce in kind, a landholder may summarily obtain his share of it, without having recourse to a regular suit, which would be of little use if the tenant had already appropriated and dissipated the whole of the crop.

Turner, J.—The 93rd section of the Rent Act declares that, except in the way of appeal as thereafter provided, " no Courts other than Courts of Revenue shall take cognizance of any dispute or matter in which any suit of the nature mentioned in that section might be brought, and such suits shall be heard and determined in the said Courts of Revenue * * * and not otherwise."

The terms of this section admit of a very wide construction. Reading the paragraphs separately, not only is it declared that such suits as are mentioned in the section are to be tried only in the Revenue Courts, but there is also a direction that no Courts other than Revenue Courts are to take cognizance of any dispute or matter in which any suit of the nature mentioned in the section might be brought.

If this direction be construed strictly, there are classes of cases constantly entertained by the Civil Courts erroneously. There are disputes and matters in which suits of the nature mentioned in s. 93 might be brought in the Revenue Courts, but of which the Civil Courts take cognizance for the purpose of granting other relief than could be granted by the Revenue Courts. If those [223] Courts ought not to entertain them, the provisions of the Rent Act worked a far more extensive change than has been generally understood. Possibly the proper construction of the first paragraph of the section, reading it with the second, would be this, that it prohibits the Civil Courts from

entertaining claims when relief substantially similar to that sought might be obtained by a suit in the Revenue Court of the nature mentioned in s. 93. Otherwise I can conceive instances in which suitors would be debarred from obtaining relief which, before the passing of the Act, they might have obtained in the Civil Court, and which the Revenue Court is not competent to grant.

I cannot then rest the conclusion at which I have arrived altogether on the ground that, if this suit be not a suit for rent, the dispute or matter is one in which a suit for rent might be brought, and that the jurisdiction of the Civil Courts is excluded.

That the suit is not strictly what would be termed a suit for rent is, I think, clear. Rent is defined in the Rent Act (and the definition expresses the ordinary sense of the term) as meaning "whatever is to be paid, delivered, or rendered by a tenant on account of his holding, use, or occupation of land." It was admitted in the course of the argument that the suit was brought on an alleged contract or understanding to deliver a certain share of the crop as the rent of the holding, and there was no contract or understanding to pay money in the event of a failure to deliver the share of the crop. If the contract or understanding had been in the alternative, for the delivery of the crop or its market-value at the date on which delivery should have been made of the share of the crop, then a suit for the share of the crop or a suit for its money-value would have been a suit for rent : it would have been a suit for that which was to be paid, delivered, or rendered by the tenant, but inasmuch as in the case referred there was no such alternative contract, the only suit for rent in its strict sense which the landlord could have brought would have been a suit for the share of the crop, and in claiming the money-value of the crop he is claiming not rent, but damages or compensation for the non-payment of rent. I would here notice that the decision of the Sudder Court in *Phultoo Kooree v. Imman Beudee* (S. D. A. Rep., N.-W. P., 1864, vol. ii, 671) has been overruled by innumerable [224] decisions of this Court, and the suits of the nature of that suit are now brought in the Civil Court and tried as suits for damages.

In a strict sense, then, I cannot allow that the suit out of which this reference arises is a suit for rent, but suits of this nature have, I believe, for a very long period been regarded as suits for rent and tried in the Revenue Courts. In Mr. Thomason's Directions for Collectors of Land Revenue, s. 265, they are expressly mentioned as suits cognizable by the Revenue Courts. When Act X of 1859 was in force, and subsequently to the passing of Act XVIII of 1873, I believe I am right in asserting that such suits have been instituted in the Revenue Courts as rent suits, and heard on appeal by this Court, and that hitherto no objection has been taken to the competency of the Revenue Courts to entertain them. On the other hand, I do not remember any case in which such a suit has been instituted in the Civil Court. Under these circumstances, I think the rule *cursus curiae let curiae* should be applied, and that we should hold that such suits, although they may not be strictly suits for rent are to be regarded as embraced in that term in s. 93 of the Rent Act, and that the large terms in which the first paragraph of s. 93 is couched may fairly be read as prohibiting the Civil Courts from entertaining a suit of the nature mentioned in the reference.

Spankie, J. - The claim here was for the balance of the corn-rent of the *sir* land in suit, amounting to Rs. 29-1-2, being the market-price of the grain to which plaintiff was entitled as his share of the produce from 1278 Fasli to 1280 Fasli.

The defendant entirely repudiated any relation of landlord and tenant between the plaintiff and himself, and urged that the land on account of which rent was claimed had been in his possession as his *sir*, he being a sharer in the mahal.

The Assistant Collector found that the farmers (they are thus described by the Assistant Collector) of the plaintiff's share, and other sharers had always received corn-rent out of the produce of the land in suit, and other lands paying rent in kind, and held by the defendant, in proportion to their shares. In 1278 Fasli, plaintiff's land was released from possession of the farmers and defendant was found to be in arrears. He also found by [225] reference to the Revenue Court's decisions that the plaintiff in this suit and other sharers had brought suits against their tenants for arrears of rent of their shares and had obtained decree. The defendant was a sharer in the mahal, but he was a cultivator only of the lands on account of which rent was claimed. He made no objection to the amount of the price of grain. But the Assistant Collector made an inquiry and found that it had been entered correctly in the balance-sheet furnished by the patwari according to the market-rate. He, therefore, made a decree for the sum claimed.

There was an appeal to the Collector. It was urged that as the Assistant Collector had admitted that defendant was a sharer in the mahal, he could not decree against him for rent, and that defendant held the land as his *sir* and not as a cultivator. The Collector held that the evidence in support of the plea that plaintiff's lessees used to get a portion of the produce of these three bighas was unworthy of credit. The plaintiff allows that he never received a share of the rent, and therefore there was no custom of previously receiving a share of the rent proved. He also found the land to be defendant's *sir*.

The Judge in appeal held that there was proof that the rent had been received by plaintiff, who distinctly deposed that he had received it, and during the lease that the lessees had received it. There was no proof that defendant had ever held these lands in any other character than as a cultivator. The land was not his *sir*.

Amongst other pleas in special appeal it was contended that an action for the value of grain was not cognizable by the Revenue Court. The Division Bench before whom the appeal was heard has referred the following question to the Court at large—whether, when rent is payable in grain, it is competent to the landlord to sue in a Revenue Court for the equivalent in cash.

It has been necessary to set out the facts in order that we may thoroughly understand the question before us. In my opinion the suit cannot be regarded as merely an action for the value of grain, or as one for damages on account of rent wrongly withheld. It is substantially a claim for rent to which the plaintiff considers himself entitled, and which the defendant refuses to pay, as he sets [226] up his own proprietary title. The rent is payable in kind after a division of the produce. Now rent under Act XVIII of 1873 is defined to be whatever is paid, delivered, or rendered by a tenant on account of his holding, use, or occupation of land. Where rent is due and withheld, the remedy provided by Act X of 1859, which had not been repealed when the cause of action arose in this case, was distress (Act X of 1859, s. 112) or a summary action. But distress could have been had for a balance of one year and no more (Act X of 1859, s. 113). The present suit is for a balance of three years. Under the new law, as under the old, the produce of all land in the occupation of a cultivator shall be deemed hypothecated for the rent payable in respect of such land (Act XVIII of 1873, s. 56), and under s. 43 of the Act provision has been

made in cases where the rent is taken in kind by division of the produce, or by estimate or appraisement of the standing crop, or other procedure of a like nature requiring the presence both of the cultivator and landholder. If either the landholder or the tenant personally or by agent neglect to attend at the proper time, or if there is a dispute as to the amount or value of the crop, an application may be made by either party to the Collector requesting that a proper officer may be deputed to make the division, estimate or appraisement. After following the procedure set forth in the section, written authority shall be given to the party applying for it to divide the crop or cut the crop. But this section would not apply to a case like the one before us, in which rent is claimed for a period of three years. Moreover, s. 43, in my opinion, contemplates a case in which there is no denial of the relationship of landlord and tenant between the parties, and in which it is not disputed that the rent is ordinarily taken in kind by division, or by estimate or appraisement. It would not apply to a case in which the tenancy was denied and proprietary right was asserted by the person occupying the land. The procedure to be followed under s. 48 is a summary one for the purpose of enforcing division when the crop, already hypothecated to the landlord, is ripe, and the latter is at liberty to take his share of the produce as his rent, the rent being due when the crop is ready to be cut or is cut. But I do not understand that the remedy provided by s. 43 would [227] deprive the landlord of his right of action under s. 93 for arrears of rent.

Prior to the passing of Act X of 1859 the landlord was at liberty to distrain the crop of his tenant for rent due for one year; but, if he did not do so, he was at liberty to bring a summary suit for the arrear. So, as noticed above, Act X provided similar remedies, which have been continued under Act XVIII of 1873, and indeed enlarged as regards cases in which the rent is payable by division of the produce. But there is nothing in s. 43 which bars recourse to any other remedy provided by the Act. Nor does s. 93 bar any suit for arrears of rent that is not paid in cash. Bearing in mind that rent is whatever is to be paid, delivered, or rendered by a tenant, it would seem to me that the suit would be for cash-rent, for rent payable in kind, or, if the produce itself is not to be had, that a suit would lie for its equivalent in money. It is clear that when a crop is ripe it must be cut, or it would wither and be lost, and if cut, a share of it could not be recovered in a summary suit under the Act, for the grain would have disappeared, or if not cut, it would be worthless as some time must elapse before a suit could be brought or a decree obtained. Again, the dispute may be one, as this is, in which the right to recover any rent is denied, and if there could be no suit under s. 93, then the landlord would be deprived of all remedy under the Act, or he must have recourse to an action in the Civil Courts, and if so, what becomes of the provision of s. 93 that, except in the way of appeal, no Courts other than Courts of Revenue shall take cognizance of any dispute or matter in which any suit of the nature mentioned in the section might be brought, and such suits shall be heard and determined in the said Courts of Revenue in the manner provided in the Act and not otherwise? Amongst these suits are suits for arrears of rent on account of land or on account of any rights of pasturage, forest rights, fisheries, and the like. In such suits the plaint is to state the subject-matter of the claim. Now merely looking at the plaint in this case, the subject-matter of the claim is that the landlord wants his rent and nothing else. It has not been paid for three years, so he cannot get the share of the produce in actual grain, therefore he asks for the equivalent, i.e., the market value of the crop proportionate to the share to which he was entitled. [228] It is not urged by the defendant that the suit was bad because a claim could not be heard in the Revenue Court for an equivalent in cash of the share of the grain to which the

plaintiff was entitled as rent. It was not so urged in appeal until the case came to this Court. Prior to the passing of Act X of 1859 it was the custom of our Revenue Courts to hear such suits as this. After quoting the law applicable to restraint, Mr. Thomson says:—"By summary suit the landlord may establish his right to a certain quantity of grain, or its *money-equivalent* at the market-price of the day" (Directions for Collectors of Land Revenue, s. 265). This section, it is true, has been superseded, but it indicates the practice of the Courts prior to the passing of Act X of 1859, which superseded the law on which the remarks in s. 265 and other sections on the same subject are based; and, as pointed out above, Act X of 1859 re-enacted the same remedies, and Act XVIII of 1873 has enacted and even enlarged those of Act X of 1859. I cannot doubt that the same practice of suing in some cases, such as this, for the equivalent in money was followed as long as Act X was

Phulloo Kooaree v. Imam Bandee Begam (S. D. A. Rep., N.W. P., 1864, vol. ii, 671). cited, in which the Sudder Dewanny Adawlat held that, where a zemindar sued a ryot to recover the value of half the produce of two fruit-trees standing on the cultivated land held by the latter, the suit was one

for arrears of rent due on account of a manorial right contiguous to a forest right and cognizable under cl. 4, s. 23, Act X of 1859. It will be observed that the Collector in the case now before us calls attention to the fact that rent had been taken from the defendant and other tenants in the village in which the parties reside, and I apprehend from his remarks that these rents were payable in the same way as the rent in this suit is said to be payable—that is, in kind.

I may add that in the Lower Provinces suits of this nature are heard and determined under the Bengal Revenue Act. I find

Junna Doss v. Gawsee Meah (21 W. R., 124). in the case cited in the margin that it was held, in a suit to recover money due on payment in kind for the use of plaintiff's land by stacking timber

thereon, that the claim was of the nature of one for rent. In this [229] case the suit "was in substance a suit brought to recover money due, or the value of a certain proportion of goods which ought to be paid in kind." I cannot say whether this particular suit was brought under the Bengal Revenue Act (VIII of 1869); possibly it was not so brought, but whether it was so or not, it is a case which shows that a suit may be entertained for money due or the value of a certain proportion of goods which ought to be paid in kind. The case now to be cited was one for arrears of rent and brought under the special

Bibee Jan v. Bhajul Singh (21 W. R., 438). Revenue Act. The rent was said to have been payable in kind, and the plaintiff's suit was for the value of his share. So again, in another case, the suit was for

arrears of rent, and with respect to a portion of the claim the Court remarked:—"In respect to what are called cesses, we think they are not so much in the nature of cesses as of rent in kind (*Budhna Orawan Mahtoon v. Jugessur Doyal Sing*, 24 W. R., 4)." In this case money was sued for. I notice these cases to show that suits, such as this is, appear to have been admitted without question, and such a plea as that raised in special appeal which has led to the present reference was never, as far as I can discover, brought before the Calcutta High Court.*

Looking therefore at past practice, at what appears now to be the practice of the Courts, having due regard to the definition of rent in Act XVIII of 1873,

* See *Mullick Amanut Ali v. Utloo Pasec*, 25 W. R., 140, where a similar plea was raised, with a reference to Act VIII (Bengal) of 1869, the Calcutta High Court ruling that a suit for the value of rent payable in kind was cognizable under that Act.

to the fact that the jurisdiction of all Courts but the Revenue Courts is barred in these Provinces in suits which are of the nature of those mentioned in s. 93, and considering that the suit before us is one substantially and entirely for rent, I would say, in answer to the reference, that the landlord is competent to sue in the Revenue Court for the equivalent in cash where rent is payable in grain.

Oldfield, J.—I concur in the view taken by Mr. Justice SPANKIE on the question referred and in his proposed answer to the reference.

NOTES.

[See also 1 C. W. N. 55.]

[230] APPELLATE CIVIL.

The 29th May, 1876.

PRESENT:

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR. JUSTICE PEARSON.

Skinner.....Plaintiff

versus

Orde and others.....Defendants.

Act VIII of 1859, s. 308—Pauper suit—Institution of suit—Presentation of plaint—Limitation.

Where an application for permission to sue *in forma pauperis* is numbered and registered, and deemed to be the plaint in the suit, not in consequence of proof of the plaintiff's pauperism, but in consequence of his abandoning his claim to sue as a pauper and paying for the stamps required for the institution of the suit, the date of such payment, and not the date of the application, must be taken, in computing the period of limitation, to be the date of the presentation of the plaint and the institution of the suit.*

THE plaintiff in this suit presented to the Subordinate Judge of Meerut on the 21st February 1873 a petition for leave to sue as a pauper. This petition contained a statement of his claim to certain immoveable property and such particulars as are required in a plaint, the cause of action being stated to have arisen in August 1861. After various proceedings to which it is unnecessary for the purposes of this report to refer, the 27th November 1874, was fixed for hearing the application; but on the 27th November the plaintiff, instead of following

* Regular Appeal, No. 115 of 1875, from a decree of the Subordinate Judge of Meerut, dated the 6th July 1875.

† Where an application to sue as a pauper is granted, and numbered and registered as a suit, the period of limitation should be reckoned, not from the day on which the application was granted, but from the day on which it was presented—*Seeta Ram v. Goluk Nath, Marsh, 174 ; S. C., 1 Hay, 378, and Ind. Jur. 67 ; Bipro Pershad Myice v. Kanje Dejee, 1 W. R. 841 ; Vinayak K. Dhavee v. Bhau B. Samvat, 4 Bom. H. C. B. A. C. J., 39*; and see the Indian Limitation Act, 1871, s. 4, Explanation.

up his application, filed the stamps requisite for the institution of the suit. On the 29th December the Subordinate Judge directed that the application should be numbered and registered, and deemed to be the plaint in the suit.

At the hearing of the suit¹ the Subordinate Judge held that it must be taken to have been instituted on the 27th November 1874, and therefore dismissed it as barred by limitation.

The plaintiff appealed against this decision to the High Court.

Mr. Conlan and Pandit Nand Lal, for the Appellant.

Mr. Mahmood, the Junior Government Pleader (Babu Dwarka Nath Banerji), and Pandit Bishambar Nath, for the Respondents.

[281] The Judgment of the Court was as follows:

The cause of action in this suit accrued to the plaintiff in August 1861, when his father died; and the period during which the suit might legally be brought is 12 years. If the suit can be held to have been instituted on the 21st February 1873, the date on which the application for permission to sue *in forma pauperis* was first presented to the Subordinate Judge of Meerut, it is clearly within time; and there can be no doubt that, had the application of the 21st February 1873, been granted, the suit would rightly be deemed to have been instituted on that date. But that application never was granted, and was indeed virtually withdrawn on the 27th November 1874, by the plaintiff's offer to pay the amount of the fee chargeable on the plaint under the Court Fees' Act before the inquiry into his pauperism had been concluded, and his application was not numbered and registered and assumed to be the plaint in the suit under the provisions of s. 308, Act VIII of 1859, in consequence of proof of his pauperism, but in consequence of the payment by him of the proper fees. But there is no provision in the law which allows the application presented under s. 299 of the Code to be deemed the plaint in the suit when such application has been in effect revoked and superseded by the payment of the fees chargeable under the Court Fees' Act. In such a case we conceive that the date of the presentation of the plaint and institution of the suit must be taken to be the date of the payment of the fees; and we are therefore unable to rule that the lower Court has erred in declining the present suit to have been instituted after the lapse of the period allowed by the law. We have no alternative but to dismiss the appeal with costs.

NOTES.

¹ This case was revised and remanded by the Privy Council, see 2 All., 241.]

[1 All. 281]

APPELLATE CIVIL.

The 29th May, 1876.

PRESENT:

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR. JUSTICE PEARSON.

Ram Autar and others.....Judgment-debtors

versus

Ajudhia Singh and others.....Decree-holders.*

Execution of decree—Act IX of 1871, sch. ii, 167—Limitation.

An application for the partial execution of a joint decree by one of the [232] decree-holders is not an application according to law † and consequently has not the effect of keeping the decree in force.‡

Where a decree of the Sudder Court awarded costs in the lower Court to certain defendants separately and to eight sets of defendants collectively, and costs in the Sudder Court to three sets, and the only applications which were made for execution of the decree within the period of limitation were made by one of the defendants to recover his costs in the lower Court and a fractional share of the costs in the Sudder Court awarded to his set of defendants, a subsequent application by him and the other defendants for execution of the decree was held to be barred by limitation.

THE judgment-debtors in this case had sued 126 defendants to recover the value of certain property. The Court of First Instance, on the 30th May 1862, gave them a decree against [233] thirteen of the defendants for a portion of

* Miscellaneous Regular Appeal, No. 50 of 1875, from an order of the Subordinate Judge of Gorakhpur, dated the 28th July 1875.

† See also *Balkishun v. Mahomed Tazam* (H. C. R., N.-W. P., 1872, p. 90); *Rai Damodur Dass v. Bhulanath* (H. C. R., N.-W. P., 1870; p. 418); *Prannath Mitter v. Mothooranath Chucherbutty* (6 W. R., Mis., 64); *Maharanee Indurjeet Koonwar v. Mazum Ali Khan* (6. W. R., Mis., 76); *Thakoor Dass Singh v. Luchmeepul Doogur* (7 W. R., 10); *Judoonath Roy v. Ram Buksch Chuttangee* (7 W. R., 538); *Purna Chandra Mookerjee v. Sarada Charan Ray* (3 B. L. R., App., 21; S.C. 11 W. R., 241); *Huro Sunkur Sandyal v. Taruck Chunder Bhuttacharjee* (11 W. R., 488); *Indro Coomar Dass v. Mohines Mohnen Roy* (15 W. R., 159); *Nubo Kishore v. Anund Mohun* (17 W. R., 19); *Faez Buksch Chowdhry v. Sadut Ali Khan* (23 W. R., 282); and *Nund Coomar Foulehdar v. Bunso Gopal Sahoy* (28 W. R., 342).

‡ The decisions under s. 20 of Act XIV of 1859 (corresponding to Act IX of 1871, sch. ii, 167) may be summarised as follows:—

(i) It has been held in *Chooda Sahoo v. Tripura Dutt* (18 W. R., 244) that, when a decree is passed severally in favour of a number of persons distinguishing a certain portion of the aggregate amount decreed as payable to each and one of those persons takes proceedings in execution for the recovery of his own portion, such proceedings do not keep the decree alive for the benefit of the others.

(ii) It has been held in *Brijo Coomar Mullick v. Ram Buksch Chatterjee* (1 W. R. Mis., 2) that when a decree is passed jointly in favour of a number of persons and one of those persons is allowed under s. 207 of Act VIII of 1859 to proceed for the recovery of the whole amount decreed, proceedings taken by him keep the decree alive for the benefit of the others. *Johiroonissa Khattoon v. Ameerounissa Khattoon* (6 W. R., Mis., 59) would seem to have been a case of this class.

(iii) In cases where the decree has been joint, but one of the decree-holders has been allowed to take proceedings to realize what, as between him and the others, has been regarded as his share, or where one of the heirs of a decree-holder has taken proceedings to

the sum claimed, dismissing the suit against the rest. Eight of these thirteen appealed to the Sudder Court. The plaintiffs also appealed against so much of the first Court's decision as was in favour of the defendants. The Sudder Court, dismissing the plaintiffs' appeal, reversed the decree against the defendants, including those who had not appealed from the decree. The decree of the Sudder Court, dated the 31st March 1864, awarded costs in the Court of First Instance to certain of the defendants, among whom was Ajudhia Singh, separately, and to eight sets of defendants collectively, and costs in the Sudder Court to three sets. On the 23rd March 1867, execution of the decree was stayed pending the determination of an appeal preferred by the plaintiffs to the Privy Council. On the 11th February 1870, the Privy Council reversed the decree of the Sudder Court so far as it reversed the decree of the Court of First Instance and restored and affirmed that of the Court of First Instance.

On the 7th September 1871, an application for enforcing the Sudder Court's decree by the imprisonment of the judgment-debtors was made to the Court of First Instance by Ajudhia Singh, who sought to recover his costs in that Court and a fractional share of the costs in the Sudder Court awarded to his set of defendants. On the 8th September the Court directed notice to issue to the judgment-debtors to show cause on the 27th September why the decree should not be executed against them. On the 28th September the Court directed them to be arrested, and fixed the 1st November for the further hearing of the application. On the 7th November it directed that the application should be struck off, Ajudhia Singh having failed to deposit talabana. On the 13th August 1874, Ajudhia Singh made a similar application. This application was also struck off owing to his failure to deposit talabana. On the 20th May 1875, application for execution of the decree was made by him and the other decree-holders. The judgment-debtors objected that execution of the decree was barred by limitation, but the objection was overruled by the Court of First Instance.

On appeal by the judgment-debtors to the High Court, it was again contended that execution of the decree was barred by limitation.

[284] The Senior Government Pleader (*Lala Juala Parshad*) for the Appellants.

Lala Lalita Parshad and *Lala Kashu Parshad* for the Respondents.

The following Judgments were delivered by the Court:—

Stuart, C.J.—The application of the 7th September 1871, prayed only for the partial execution of the decree and had not therefore the effect of keeping the decree alive for the other defendants. The same may be said of the application of the 13th August 1874. The application of 1871 itself is before realize his share of the decree, it has been held that such proceedings, even where irregular (see note (1) *supra*), kept the decree alive for the benefit of the others—*Maharance Indurjeet Koonwar v. Masum Ali Khan* (6 W. R., Mis., 76); *Azizunissa Khatun v. Sashi Bhushan Bose* (2 B. L. R., App., 47; S.C. 11 W. R., 343); *Shib Chunder Dass v. Ram Chunder Poddar* (16 W. R. 29) and cases there cited.

Where there is a decree *against* a number of persons, it has been held

(i) That where such decree is against all jointly proceedings taken to enforce it against one keep it alive against all—*Shaikh Bunecad Ali v. Juggessur Singh* (6 W. R., Mis., 25); *Mohesh Chunder Biswas v. Sreemutty Taramonjee Dossee* (9 W. R., 240).

(ii) That when such decree is against the defendants separately distinguishing the shares payable by each, proceedings taken against one do not keep it alive against the others—*See Wise v. Rajnarain Chuckerbutty* (10 B. L. R., 258), by Full Bench, adopting the view taken in *Stephenson v. Unnoda Dossee* (6 W. R., Mis., 18), and *Khenna Debea v. Kumolakant Bukshi* (10 B. L. R., 259 note; S.C., 10 W. R., 10) and overruling *Mohesh Chunder Chowdhry v. Mohun Lal Sircar* (8 W. R. 80).

... and it is difficult to understand how any contention to the contrary should have been expected to succeed. It recites previous applications by Ajudhia Singh in conjunction with other defendants, and also the judgment of the Privy Council, and it then proceeds:—"As the other persons do not join me in executing the decree, and in the decree the first Court's costs are separately entered in my name, while the costs of the Subordinate Court, amounting to Rs. 969-12-0/- are entered in my name and in those of the other persons collectively; I who do not join in executing the decree, I apply for execution in respect of a 1-11th share, leaving out 10-11ths the share of the said persons, and pray that it may be realized from the judgment debtors." The application of 1871 appears to have been in similar form; and therefore most carefully and precisely restricted to the applicant's own share could scarcely have been worded, and how, in the face of them, the Subordinate Judge could have issued his orders of the 8th and 28th September 1871, is, to say the least of it, not very intelligible.

This decree is a joint decree, and no application for its partial execution could keep it alive, for the defendants as a body, and Ajudhia Singh's applications of 1871 and 1874, having been confined to his own individual interest in it, in the very clear and unmistakeable terms in which I have adverted, could not be availed of so as to bring the present application within the three years. The order therefore recognizing and proceeding upon it cannot stand. The appeal must be allowed, and with costs.

Pearson, J.—It appears that the execution of this decree was stayed in pursuance of this Court's order, dated 28th March 1867, [288] in consequence of an appeal lying having been lodged in the Privy Council against the decree of the late Sudder Court, dated 31st March 1864. The appeal was disposed of by the Privy Council's decree, dated 11th February 1870, valid to the 1st no

If it be assumed that the application made by Ajit Singh alone on the 7th September 1871, for the execution of a small part of the decree was within time, under art. 167, sch. ii, Act IX of 1871, as having been presented

*[Art. 167 :-] *Article 167 of the Constitution of India, dealing with the formation of Legislative Assembly.*

For the execution of a decree Three years : The date of the decree or or order of any Civil Court not provided for by No. 169.

decree or order of the Appellate Court, or (where there has been a review of judgment) the date of the decision passed on the review, or (where the application next hereafter mentioned has been made) the date of applying to the Court to enforce, or keep in force, the

within three years from the date of the Privy Council's decree, it must, nevertheless, be held that, inasmuch as it prayed for the partial execution of a joint decree, it was not an application according to law and had not the effect of keeping the decree in force. The same remark applies to Ajudhia Singh's last application of 13th August 1874.

The present application by Ajudhia Singh and others of the 20th May 1875, is therefore beyond time. It will accordingly decree the appeal with costs, and reversing the lower Court's order disallow the application.

Puran Mal.....Defendant.

[1 All. 235]

APPELLATE CIVIL.

The 1st June, 1876.

PRESENT:

MR. JUSTICE TURNER AND MR. JUSTICE SPANKIE.

Puran Mal.....Defendant

v.

Matekhana.....Plaintiff.

Act VIII of 1859, s. 260 Execution of decree Certified purchaser.

A sued for a declaration that *I*, the certified auction-purchaser of certain immoveable property, was merely a trustee for *R*, *I*'s judgment-debtor, that the purchase in *I*'s name was made with the intent of defeating or delaying him in the execution of his decree, and that he was at liberty to apply for execution against the property as the property of his judgment-debtor.

Held, following *Sohum Lall v. Gya Parshad*, (H. C. R., N.-W. P., 1874, p. 265) that s. 260, Act VIII of 1859, was in no way a bar to the suit.

As this case merely follows the decision in *Sohum Lall v. Gya Parshad*, it is not reported in detail.

NOTES.

[As to whom see, 317 C. P. C. 1882 operated as bar see also (1894) 21 Cal. 519; (1903) 26 All. 82; (1898) 21 All. 29; (1896) 18 All. 461.]

Regular Appeal, No. 18 of 1876, from a decree of the Subordinate Judge of Bareilly, dated the 26th February 1876.

[236] FULL BENCH.

The 1st June, 1876.

PRESENT :

SIR ROBERT STUART, K.T., CHIEF JUSTICE, MR. JUSTICE PEARSON,
 MR. JUSTICE TURNER, MR. JUSTICE SPANKIE AND MR. JUSTICE OLDFIELD.

Akhe Ram.....Plaintiff

versus

Nand Kishore.....Defendant.*

Act XX of 1866, s. 53—Bond—Mortgage—Money-decree—Sale in execution.

The obligee of a simple mortgage-bond was only entitled, under s. 53, Act XX of 1866, to a money-decree.

Nothing passes to the auction-purchaser at a sale in execution of a money-decree but the right, title and interest of the judgment-debtor at the time of the sale (see the following case).

Where, therefore, a decree given under s. 53,† Act XX of 1866, declared the right of the obligee of a simple mortgage-bond to bring to sale the hypothecated property, and such property was sold in execution of the decree, the auction-purchaser could not claim in virtue of the lien created by the bond to defeat a second mortgage.

THE property in suit, a 6-biswa share in a certain village, belonged originally to one Gardener. On the 10th November 1870, Mathra Das and Mulchand, the obligees of a bond for the payment of money personally, executed in their favour by Gardener on the 9th December 1867, in which the property was hypothecated as collateral security, applied, the bond having been specially registered for the amount secured thereby, under the provisions of s. 53, Act XX of 1866. They obtained a decree against him on the 22nd November 1870, which was in these terms :—"The claim is decreed in favour of the plaintiffs against the defendant and the hypothecated property." The property was sold in execution of this decree on the 20th December 1873, and was purchased by the plaintiff.

At the time of the sale the defendant in the present suit was in possession of the property under a mortgage from Gardener, dated the 5th January 1870.

* Regular Appeal, No. 80 of 1875, against a decree of the Subordinate Judge of Aligarh dated the 18th May 1875.

† Sec. 53 :—Within one year from the date on which the amount becomes payable, or, where the amount is payable by instalments, within one year

Enforcement of such agreement. from the date on which any instalment becomes payable, the obligee of any such obligation registered with such agreement as aforesaid, whether under the said Act No. XVI of 1864 or under

this Act, may present a petition to any Court which would have had jurisdiction to try a regular suit on such obligation for the amount secured thereby, or for the instalment sought to be recovered.

The petition shall, where a stamp is required by law, bear a stamp of one-fourth the value prescribed for a plaint in such a suit, and may be amended by permission of the Court, and the statements in the petition

shall be verified by the petitioner in manner required by law for the verification of plaints.

On production in Court of the obligation and of the said record signed as aforesaid, the petitioner shall be entitled to a decree for any sum not exceeding

Decree. the sum mentioned in the petition, together with interest at the rate specified (if any) to the date of the decree, and a sum for costs to be fixed by the Court.

Such decree may be enforced forthwith under the provisions for the enforcement of decrees contained in the Code of Civil Procedure.]

The plaintiff now sued to set aside the mortgage to the defendant and for possession of the property.

The Court of First Instance dismissed the suit.

[287] The plaintiff having appealed to the High Court, the Court (TURNER and SPANKIE, JJ.) referred the following question to the Full Bench, *viz.* :—

"Whether or not when property hypothecated in a bond is sold at auction in execution of a decree passed on the bond under the special provisions of s. 53, Act XX of 1866, the purchaser acquires merely the rights and interests of the judgment-debtor remaining at the time of the sale or can claim in virtue of the lien to defeat a second mortgagee."

Pandit Bishambar Nath (with him Munshi Hanuman Parshad), for the Appellant.—There is no prohibition in Act XX of 1866 against a Court granting a decree declaring the right to bring to sale the property pledged in the obligation. The appellant is entitled, in virtue of the lien created on the property in suit by the bond dated the 10th November 1870, to oppose all liens subsequently created. He referred to *Momtazoodeen Mahomed v. Rajcoomar Dass* (14 B. L. R., 408; S.C., 23 W. R., 187) and *Ramu Naikan v. Subbaraya Mudali* (7 Mad., H. C. R., 229).

Mr. Mahmood (with him the Junior Government Pleader, Babu Dwarka Nath Banerji), for the Respondent.—The decree in execution of which the appellant purchased the property in suit is only to be regarded as a money-decree, inasmuch as no decree could be given, under s. 53, Act XX of 1866, declaring the right of the obligee to bring to sale property pledged in the obligation as collateral security—*In the matter of Rajmohan Mookerji* (11 W. R., 222); *Grisch Chunder Chowdhry v. Kristo Soondur Sandyal*.* The purchaser at a sale in execution of a money-decree takes only the rights and interests of the judgment-debtor at the time of the sale.

The opinions of the Full Bench were as follows :—

Stuart, C.J.—My answer to this reference is that a decree passed under s. 53, Act XX of 1866, is and can only be a mere money-decree, and that a sale in execution of such a decree can only give the purchaser the rights and interests of the judgment-debtor in the property hypothecated, and that such purchaser [288] cannot claim in virtue of his lien to defeat a second mortgagee. I hold this opinion so clearly, and it is suggested to my mind so simply and directly by what I consider to be the true meaning of s. 53 of Act XX of 1866, and by the relative position of the two bond-holders, that I think it unnecessary to support it by any argument or by any reference to authorities. The Calcutta and Madras cases referred to at the hearing † do not, in my opinion, apply.

Pearson, J.—Section 53, Act XX of 1866, distinctly states the nature of the decree which may be given to a petitioner on production in Court of the obligation and the record of agreement mentioned in the preceding section. He shall be entitled to a decree for any sum not exceeding the sum mentioned in the petition, together with interest at the rate specified (if any) up to the date of the decree. The decree can be only a decree for money; and, the purchaser of any immoveable property sold in execution thereof under s. 259, Act VIII of 1859, could only be held to have purchased the right, title and interest of the judgment-debtor in the property sold.

* 14 W. R., 277; see also *Juggun Nath v. Komal Singh* (H. C. R., N.-W. P.) 1871, p. 128; *Boistub Churn Diggutty v. Gobind Pershad Tewaree* (18 W. R., 203), *Asma Bibee v. Ram Kant Roy* (19 W. R., 251); and *Poorno Chunder Ghose v. Gobind Chunder Mookerjee* (22 W. R., 28).

† *Momtazoodeen Mahomed v. Rajcoomar Dass* (14 B. L. R., 408; S.C., 23 W. R., 187); *Ramu Naikan v. Subbaraya Mudali* (7 Mad., H. C. R. 229).

In the case out of which the reference has arisen, it appears that the decree which was given to Mathra Das and Mulchand, under s. 53 of the Act above-named, was in its terms against the property hypothesized in that bond executed by Mr. Gardner in their favour on the 9th December 1867, as well as against him, but I concur in the opinion expressed by the Subordinate Judge that so much of the decree as declares the property liable must be regarded as null and void for want of jurisdiction.

The plaintiff in the case purchased the property at auction on the 20th December 1873, subject to the lien which had been created in the defendant's favour by the instrument of the 5th January 1870, and cannot, in my opinion derive any benefit from the circumstance that, under the bond of the 9th December 1867, Mathra Das and Mulchand possessed a "lien" which would have taken precedence of that possessed by the defendant under the instrument of the 5th January 1870, had it been a question which of the two liens should prevail over the other, but there is no such question. The debt [239] secured by the earliest lien is understood to have been realized by Mathra Das and Mulchand; at all events they are not trying to enforce the lien, if it has not been altogether extinguished with the debt which it was intended to secure. The plaintiff as auction-purchaser of Mr. Gardner's rights and interests could not acquire by the purchase of them the lien which belonged to Mathra Das and Mulchand, nor indeed were those rights and interests, being sold in execution of what must be regarded as a mere money-decree, sold in virtue and pursuance of that lien. He cannot therefore in virtue thereof successfully resist the defendant's claim to enforce his lien under the instrument of the 5th January 1870.

Turner, J.—The provisions of s. 53, Act XX of 1866, were intended to apply to personal obligations for the payment of money, and where such an obligation was found combined with an hypothecation of property as collateral security, the creditor was entitled to obtain a summary decree on the personal obligation only. A decree duly passed under the provisions of the Act would be what is known in these provinces as a mere money-decree, and where it appears on the face of the decree that, although it professed to declare the lien, it was passed under the special provisions of s. 53 it could only be held valid as a money-decree, and if the holder of such a decree attached and sold the hypothesized property, for the reasons given in my judgment in *Khub Chand v. Kalidin Das* (next case), I am of opinion nothing would pass under the sale but the rights remaining in the judgment-debtor at the time of the sale.

Spankie, J.—I would say, in reply to this reference, that with regard to the provisions of s. 53, Act XX of 1866, "the decree could only have been for money, and the purchaser at the execution-sale could only acquire the rights and interests of the judgment-debtor remaining at the time of the sale, and could not claim by virtue of the lien to defeat a second mortgagee."

Oldfield, J.—A decree made under s. 53, Act XX of 1866, on a bond can properly only be a decree for the recovery of money, and not for enforcing any lien against property hypothesized in the bond; and the general practice under a course of [240] rulings of this Court has been to hold that a purchaser at auction in execution of a mere money-decree acquires merely the rights and interests which the judgment-debtor had at the time of the sale, and cannot benefit by any lien that the decree-holder may have had under the bond. On the principle of *stare decisis*, I would reply to that effect to this reference.

NOTES.

[See also 1. M. 240.]

[1 ALL. 240]
FULL BENCH.*The 9th June, 1876.*

PRESENT :

SIR ROBERT STUART, Kt., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, MR. JUSTICE SPANKIE, AND MR. JUSTICE OLDFIELD.

Khub Chand.....Defendant

versus

Kalian Das.....Plaintiff.*

Bond—Mortgage-decree—Sale in execution—Condition against alienation.

Nothing passes to the auction-purchaser at a sale in execution of a money-decree but the right, title, and interest of the judgment-debtor at the time of the sale.

Where, therefore, the holder of a simple mortgage-bond obtained only a money-decree on the bond, in execution of which the property hypothecated in the bond was brought to sale and was purchased by him, he could not resist a claim to foreclose a second mortgage of the property created prior to its attachment and sale in execution of his decree. The view of the Full Bench of the Calcutta High Court in *Montazoozdeen Mahomed v. Rajcoomar Das* † and the decision in *Ram Naikan v. Subbaraya Mudali* (7 Mad. H. C. R., 229) dissent from.

Held further, that the holder of the money-decree in this case could not avail himself of a condition against alienation contained in his bond to resist the foreclosure. *Raja Ram v. Bainee Madho* (H. C. R., N.-W. P., 1873, p. 81) impugned.

ON the 10th July 1865, the owners of the property in suit, a fractional share in a certain village, executed a bond for the payment of money personally to Khub Chand, defendant, in which they hypothecated the property as collateral security for such payment, [241] stipulating to make no transfers of it until payment. In 1868 Khub Chand sued on this bond, obtaining only, however, a decree on the personal obligation. On the 28th March 1869, the owners of the property mortgaged it to the plaintiff. The property was subsequently attached in execution of Khub Chand's decree, and was eventually brought to sale on the 20th November 1871, when it was purchased by Khub Chand.

The plaintiff now sued to foreclose his mortgage.

The Lower Courts gave him a decree.

On special appeal to the High Court by the defendant, the Court (TURNER and OLDFIELD, JJ.) referred the case to the Full Bench, the order of reference being as follows :—

The plaintiff has brought this suit to obtain possession of property by foreclosure of a mortgage under a deed dated the 28th March 1869, executed by one Sukhi Lal, and, *inter alia*, to have declared null and void the right of the defendant Khub Chand to the mortgaged property as purchaser at an auction-sale on the 20th November 1871, of the rights and interests of Sukhi Lal and Akhe under a money-decree obtained by him apparently in 1868 against them on their bond dated the 10th July 1865.

* Special Appeal, No. 43 of 1875, against a decree of the Judge of Mainpuri, dated the 27th November 1874, affirming a decree of the Subordinate Judge, dated the 10th September 1873.

† 14 B. L. R. 408; S. C., 23 W. R., 187; this case has been followed in *Aruth Soor v. Juggunnath Mohapatra*, 23 W. R., 460; see also *Byjnnath Singh v. Goburdhan Lall Mohasohree*, 24 W. R., 210.

It appears that the bond in favour of Khub Chand hypothecated the property, and contained a stipulation on the part of the obligors that they would not make transfers of the property hypothecated, and Khub Chand has contended, amongst other pleas, that the mortgage under which the plaintiff claims is in contravention of this stipulation and therefore in defraud of his rights, and that his purchase must be held free of the plaintiff's claim.

Khub Chand also pleaded that the plaintiff was in collusion with Sukh Lal to defraud him, but the Lower Courts have decided that the plaintiff's mortgage is a *bona fide* transaction so far as the plaintiff is concerned.

The question which arises, and which we refer to a Full Bench is this, whether, under the circumstances stated, Khub Chand, by his purchase at auction-sale, stands merely in the place of his judgment-debtor and is bound by his act, or whether he has, in [242] consideration of his bond, a further right, and can successfully contest the plaintiff's claim under the subsequent mortgage executed by his judgment-debtor by reason of the latter having executed it in contravention of the stipulation in the deed of 1865.

Amongst other decisions bearing more or less on the question, we notice the following of this Court:—*Rajah Ram v. Baine Madho* (H. C. R., N.-W. P., 1873, p. 81); *Lahan Bibi v. Gauri Parshad* (Unreported); *Sheobart Lal v. Ramnandan Lal* (Unreported); *Kulwant Sahu v. Ragho Nath* (Unreported); *Oonrao Singh v. Shimbhoo Nath* (H. C. R., N.-W. P., 1870, p. 38); also of the Calcutta Court—*Montazooddeen Mahomed v. Rajcaumar Dass* (14 B. L. R., 408; s.c., 23 W. R., 187); and of the Madras Court—*Iiamu Naikan v. Subbaraya Mudali* (7 Mad. H. C. R., 229).

Babu Oprokash Chunder for the Appellant, relied on *Rajah Ram v. Baine Madho* (H. C. R., N.-W. P., 1873, p. 81).

Munshi Hanuman Parshad (with him Maulvi Mehdi Hussain) for the Respondent.—The decree in execution of which Khub Chand purchased the property in suit was a money-decree only, and did not enforce his lien on the property. The purchaser at a sale in execution of a money-decree purchases the rights and interests of the judgment-debtor at the time of the sale, and therefore, if the property he purchases is encumbered at the time of the sale he purchases it subject to the encumbrance. He referred to *Madho Das v. Maina Bibi* (Unreported) and *Kelly v. Seth Gobind Das* (Unreported). As auction-purchaser Khub Chand cannot avail himself of the condition against alienation, because as such he is not a party to the bond, and cannot therefore make use of the condition—*Koondun Lal v. Wazer Ali* (H. C. R., N.-W. P., 1871, p. 205).

Stuart, C.J.—My answer in this reference is that, under the circumstances stated, Khub Chand's purchase cannot prevail against or be held free of the plaintiff's claim, but that the plaintiff is entitled to a decree against the property under his foreclosure suit. Khub Chand's decree was merely a money-decree, and the condition in his bond against alienation to others was merely personal to him and Sukh Lal, and although it might give Khub Chand a claim, for [243] damages against his debtor, it could in no way affect the right of a subsequent mortgagee in enforcing his lien. No other or further right can be allowed to Khub Chand, and he therefore cannot be permitted to contest the plaintiff's claim.

Pearson, J.—The rights and interest of his judgment-debtors were sold, not in virtue and pursuance of the lien created by the instrument of the 10th July 1865, but in execution of the decree of 1868, which was merely a money-decree, and were purchased by Kubh Chand subject to the rights which had been acquired by the plaintiff under the instrument of the 28th March 1869.

The stipulation in the earlier instrument, by which the mortgagor was precluded from alienating the property hypothecated for the purpose of securing the debt while the debt should remain unpaid, was only intended to preserve and fortify the lien which the hypothecation created and cannot be enforced apart from that lien. Khub Chand has never enforced that lien ; he contented himself with a money-decree and chose to buy himself the rights and interests remaining to his debtors in the property at the time of the auction-sale. The rights and interests which they had conveyed to the plaintiff by the instrument of the 28th March 1869, were not affected by that sale ; and so long as Khub Chand abstains from enforcing his prior lien, he cannot plead the stipulation in the instrument executed in his favour as invalidating the transfer subsequently made to the plaintiff. That stipulation does not place him on the footing of a purchaser in virtue of the lien to which the stipulation is attached. On the contrary, the position which he holds at present is no better than would be that of any stranger who might have purchased the property which he purchased in execution of his own decree. It cannot be pretended that any stranger so purchasing it could have claimed to be protected in the purchase by reason of the stipulation in the bond. The sale did not carry with it the lien which belonged to the bond holder, but only disposed of such rights and interests as still belonged to the bond-debtors. The foregoing remarks embody the opinion which I desire to express in answer to the question referred to the Full Bench.

Turner, J.—To determine the question raised in this reference it is necessary to consider the nature and incidents of a simple mortgage. A simple mortgage cannot be better defined than in [244] the terms adopted by Mr. Justice MACPHERSON in his work on mortgages. It is an arrangement by which the borrower, binding himself personally for the repayment of a loan, pledges his land as a collateral security. It comprises then two contracts, a personal obligation on the part of the mortgagor to pay the debt, and a contract empowering the mortgagee to have recourse to the property pledged as a collateral security. The pledge does not directly confer on the mortgagee the power of sale. In order to make his security available he must obtain an order of a Civil Court directing a sale. The mortgagee, in the case of a simple mortgage, has, in the event of default being made in the payment of the debt, two causes of action, the one arising out of the breach of the personal obligation, and the other arising out of the contract of hypothecation.

He may put both these causes of action in suit at once or he may pursue the one remedy at one time and the other at another. If he sues on the personal undertaking only he obtains what is known as a money-decree ; if he sues on the contract of hypothecation, he obtains only an order for the sale of the property.

Notwithstanding the pledge the mortgagor remains the owner of the property, and may deal with it in any manner he pleases not inconsistent with the condition of the mortgage. Subject to the charge created by the mortgage, he may alienate his property in part or wholly.

Such being the nature and incidents of a simple mortgage, I proceed to consider whether there is any, and if any what distinction between the interest which passes to a purchaser of the mortgaged property if it be sold under a decree pronounced in a suit brought to enforce the charge and ordering the sale, and the interest which passes to a purchaser if the mortgaged property be sold under a money-decree obtained on the personal obligation.

It appears to me there is a great difference in the two suits and a great difference in the operation of the decrees which can be obtained in the two suits.

If the holder of a simple mortgage elects to enforce his pledge and that pledge be, as it usually is, a pledge of immoveable property, he must bring the suit in the district in which the property is situated, and if he sues solely on the contract of hypothecation, he can obtain only a decree ordering the sale of [246] the pledge; he cannot have recourse to the other property of the judgment-debtor. But the sale will pass not merely the rights of the judgment-debtor existing at the time of the sale, but the rights of the judgment-debtor existing at the date of the pledge and will be binding on all persons who are parties to the suit. To a suit then to enforce the hypothecation it is advisable for the creditor, though it is not incumbent on him, to make all subsequent encumbrancers parties, and if such encumbrancers apply to be made parties, the Court should admit them under s. 73, Act VIII of 1859, and I may add, although it is not the custom in these Provinces, that in passing a decree in such a suit to which subsequent encumbrancers are made parties, the Court ought to give subsequent encumbrancers an opportunity to come in and redeem the prior encumbrance.

Of course, such subsequent encumbrancers, if they are not made parties, might at any time before sale come in and redeem and they will not be bound by the decree, but if they do not redeem and a sale takes place, their liens will be defeated unless they can show something more than the existence of their subsequent encumbrances, some fraud or collusion which entitled them to defeat the first encumbrance or to have it postponed to their own.

It appears to me doubtful whether it is necessary for the holder of a decree ordering a sale for the enforcement of a lien to proceed in execution by attachment and order for sale. If the decree is properly drawn up he has already obtained an order for sale. The Procedure Code is, I think, defective in that it contains no special provision for the execution of such decrees. They do not fall under ss. 199, 200, 201, or 202, and the provisions of s. 232 appear to

Decree for immoveable property.

* [Sect. 199:—If the decree be for land or other immoveable property, the same shall be delivered over to the party to whom it shall have been adjudged.

Sec. 200:—If the decree be for any specific moveable, or for the specific performance of any contract or for the performance of any other particular act, it shall be enforced by the seizure, if practicable, of the specific moveable, and the delivery thereof to the party to whom it shall have been adjudged, or by imprisonment of the party against whom the decree is made or by attaching his property and

keeping the same under attachment until further order of the Court, or by both imprisonment and attachment, if necessary; or if alternative damages be awarded, by levying such damages in the mode hereinafter provided for the execution of a decree for money.

Sec. 201:—If the decree be for money it shall be enforced by the imprisonment of the party against whom the decree is made, or by the attachment and sale of his property, or by both if necessary; and if such party be other than a defendant, the decree may be enforced against him

in the same manner as a decree may be enforced under the provisions of this chapter against a defendant. When the decree is against Government or against any officer acting on behalf of Government, if the officer whose duty it is to satisfy the decree, neglect or refuse to satisfy the same, the Court shall report the case through the Sudder Court for the orders of Government, and execution shall not issue on the decree unless the same shall remain unsatisfied for the space of three months from the date of such report.

Sec. 202:—If the decree be for the execution of a conveyance or for the endorsement of a negotiable instrument, and the party ordered to execute or endorse such conveyance or negotiable instrument shall neglect or refuse so to do, any party interested in having the same executed or endorsed may prepare a conveyance or endorsement of the instrument in accordance with the terms of the decree, and tender the same to the Court, for execution upon the proper stamp (if any is required by law), and the signature thereof by the Judge shall have the same effect as the execution or endorsement thereof by the party ordered to execute.]

apply to such decrees as are mentioned in s. 201. In practice no doubt such decrees have been in default of special provisions executed in the same manner as money-decrees.

On the other hand, if the holder of a simple mortgage puts in suit merely the personal obligation of the mortgagor, he need not necessarily sue in the district in which the property which is the subject of collateral security may be situated. To such a suit subsequent encumbrancers would not properly be made parties; the decree would be a mere money-decree conferring on the decreee-[246]holder the right to obtain its satisfaction by levying the amount for any property of the judgment-debtor. He is not confined to the estate under mortgage. He must proceed by attachment and sale, and what he attaches and sells is the property of the judgment-debtor, that is to say, the rights and interests of the judgment-debtor subsisting at the time of the sale—*Mahomed Buksh v. Mahomed Hossein* (H. C. R., N-W-P., 1868, p. 171). Such property passes by the sale as the judgment-debtor could convey by private sale.

In *Syud Nadir Hossein v. Pearoo Thovildarince* (14 B. L. R., 425 note) Mr. Justice PONTIFEX has ruled that a sale of the mortgaged property under a monoy-decree passes with it the lien; and in *Momtazooddeen Mahomed v. Rojcoomar Dass* (14 B. L. R., 408; s.c., 23 W. R., 187), the majority of the Court declared that, where a creditor under a bond by which property is mortgaged takes a money-decree and proceeds to attach and sell the mortgaged property, he thereby transfers to the purchaser the benefit of his own lien and the right of redemption of his debtor, and if there be no third party interested in the property it becomes absolutely vested in the purchaser. The reasons on which these rulings proceed I understand to be the following—the mere taking of a money-decree does not destroy the lien, and it continues an incident to the debt when it passes from a contract-debt into a judgment-debt—as the creditor cannot sell the property and retain the lien, it must continue in existence so far as is necessary for the protection of the purchaser. It cannot be doubted that the mere taking of a money-decree does not destroy the lien, and that it continues a collateral security for the debt when it has merged in a judgment-debt, but I fail to see on what ground it can be held that the collateral security has passed by the sale or continues in existence to protect the purchaser. The mortgagor has not in the case supposed elected to avail himself of the collateral security. The lien subsists nevertheless until the debt is discharged, when the object for which it was created fails, and it ceases.

We have not now to consider whether the holder of a simple mortgage, if he proceeds on the personal undertaking, and obtaining a money-decree, brings to sale the mortgaged property, can after-[247]wards sue the auction-purchaser to enforce his lien for any sum that may not have been satisfied by the sale in execution of the money-decree. In such a case it may be that, unless he gives notice at the sale of his intention to retain the lien, it would be held he had waived it. We have to consider whether the interests of third parties and the liens of intermediate encumbrancers can be defeated by a sale of the mortgaged property under a mere monoy-decree. In *Ram Naikan v. Subbaraya Mudali* (7 M. H. C. R., 229), it was held that the purchaser under a money-decree could avail himself of the lien of the original encumbrancer as a shield and so defeat subsequent encumbrancers, and doubtless this ruling is supported by the dicta of the High Court of Calcutta to which I have referred, namely, that the collateral security passes to the auction-purchaser. The Calcutta High Court allowed that the fact that property is mortgaged to one is no bar to the mortgage or sale of the equity or right of redemption to another. Let it be assumed that the mortgagor sells his interest absolutely, then if the mortgagor

sues on the personal undertaking only he must sue the original mortgagor, he cannot implead the purchaser, and if he obtains a decree he can enforce it only against the property of the mortgagor who *ex hypothesi* has no interest left in the mortgaged property, and if, instead of selling the mortgaged property he sells the property of the mortgagor, no interest in the collateral security can pass by such a sale to the purchaser.

In the case now before the Court the mortgagor, instead of making a transfer of the whole of his interest in the property plodged, aliened it in part by the creation of a subsequent encumbrance in the nature of a conditional mortgage. He thereby conferred on the conditional mortgagee the right to redeem the first mortgage at whatever time it could have been redeemed by the mortgagor, and the right in the event of default being made in payment of the debt due to him to foreclose and hold the property subject to the first encumbrancer. The estate of the second encumbrancer having been created before the attachment and sale in execution of the money-decree cannot be destroyed by the sale, for in my judgment the original [248] mortgagor did not take the steps necessary to entitle him to enforce his collateral security, and the sale in execution of his decree on the personal obligation passed only the rights and interests of the mortgagor subsisting at the time of the sale, and those rights in the mortgaged property were then burdened with the charge created in favour of the conditional mortgagee.

It remains to be considered whether an auction-purchaser in execution of a money-decree can avail himself of a condition in the mortgage-deed prohibiting alienation. I was a party to the decision of this Court in the case of *Rajah Ram v. Baineer Madho* (H. C. R., N.-W. P., 1872, p. 81), in which it was held that the existence of such a condition enabled the auction-purchaser to resist the claim of a second encumbrancer. On fuller consideration I am not prepared to support that ruling. The condition is attached to the charge and not to the personal obligation of the mortgagor, and if the first mortgagee, who can only enforce the charge by suit, elects to abstain from pursuing that remedy and sues on the personal obligation only, I am of opinion that the auction-purchaser cannot plead the condition attached to the lien any more than he can plead the lien. I would reply that Khub Chand having purchased under a mere money-decree the interest at the time of sale remaining in the judgment-debtor, stands in the place of the judgment-debtor in respect of the interest he acquired by the purchase, and that he cannot resist the claim of the plaintiff to obtain possession of the property.

Spankie, J.—On the case stated to us I should say that Khub Chand, by his purchase at auction-sale, stands merely in the place of his judgment-debtor and is bound by his act, and that he has not, in consideration of his bond, a further right, and cannot successfully contest the plaintiff's claim under the subsequent mortgage executed by his judgment-debtor by reason of the latter having executed it in contravention of the stipulation in the deed of 1865. It seems to me that we have decided a very similar point in Full Bench in the case of *Akhe Ram v. Nand Kishore* (preceding case).

Oldfield, J.—Looking to the course of rulings by this Court on the question raised in this reference and the rule *stare decisis*, [249] I would reply to this reference that the auction-purchaser at a sale in execution of a mere money-decree acquires only the rights remaining in the judgment-debtor at the time of sale.

[1 All. 249]

APPELLATE CIVIL.

The 9th June, 1876.

PRESENT :

MR. JUSTICE TURNER AND MR. JUSTICE OLDFIELD.

Karim Baksh and another.....Plaintiffs
versus
 Budha.....Defendant.*

Public thoroughfare—Obstruction—Jurisdiction—Act X of 1872, s. 521.

No Suit for obstructing a public thoroughfare can be maintained in a Civil Court without proof of special injury.

THIS was a suit for the removal of a portion of a "chabutra," as an encroachment on a certain road, the plaintiffs alleging that the encroachment was such that carts and other wheeled conveyances were unable to pass along the road.

The Court of First Instance found that the road was not a public thoroughfare, but the private property of the parties to the suit and other persons. Holding that the defendants were not entitled to encroach upon it without the consent of the plaintiffs, it gave the plaintiffs a decree.

The lower Appellate Court held, on the assumption that the road was a public thoroughfare, that, as the plaintiffs alleged no special damage, the suit was not maintainable.

On special appeal by the plaintiffs to the High Court it was urged that the road was not a public thoroughfare, and that even if it were, the lower Appellate Court was wrong in holding that the suit was not maintainable.

Pandit Bishambar Nath, Pandit Ajudhia Nath, and Babu Oprokash Chunder for the Appellants.

[250] Munshi Hanuman Parshad and Lala Ram Parshad for the Respondent.

The Judgment of the Court, so far as it is material to the above contention, was as follows :—

If the road is a public thoroughfare, then, inasmuch as the plaintiffs alleged no special injury, the suit for the removal of the encroachment cannot be maintained—*Baroda Prasad Mostafi v. Gora Chand Mostafi* ; *Pyari Lal v. Rooke* (3 B. L. R., A. C., 30 ; 3 B. L. R., App. 543 ; S.C., 11 W. R., 434) ; *Hira Chand Banerjee v. Shama Charan Chatterjee* (3 B. L. R., A. C., 351). There is, it is true, a decision to the contrary—*Jina Ranchod v. Jodha Ghella* (1 Bom. H. C. R., 1), but the weight of authority supports the view taken by the Judge, which accords with the English law on the subject and is based on principles well understood. But it must be determined whether the road in suit is a public thoroughfare.

* Special Appeal, No. 172 of 1876, from a decree of the Judge of Allahabad, dated the 12th February 1876, reversing a decree of the Munsif, dated the 31st July 1875.

† 8 B. L. R., A. C., 295 ; S.C., 12 W. R., 160, followed in *Raj Lukhee Debia v. Chunder Kant Chowdry* (14 W. R., 178) ; *Bhageeruth Rashee v. Gokool Chunder Mandal* (18 W. R., 58) ; *Bhageeruth Doss v. Chundee Charan* (22 W. R., 462) ; *Ramtarak Karati v. Dinanath Mandal* (7 B. L. R., 184 ; S.C., 24 W. R., 414) ; and *Parbati Charan v. Kali Nath* (6 B. L. R., App. 73.)

[1 All. 280]

APPELLATE CIVIL.

The 16th June, 1876.

PRESENT :

MR. JUSTICE TURNER AND MR. JUSTICE OLDFIELD

Zaibulnissa Bibi.....Defendant

versus

Kulsum Bibi.....Plaintiff.*

Act IX of 1871, s. 5 b—Appeal—Limitation—Sufficient cause.

A certain suit was dismissed on the 26th July 1875, on which day the plaintiff applied for a copy of the Court's decree. She obtained the copy on the 31st July, and on the 31st August, or one day beyond the period allowed by law, she presented an appeal to the Appellate Court. She did not assign in her petition any cause for not presenting it within such period, but alleged verbally that she had miscalculated the period. The Appellate Court recorded that it should excuse the delay, and admitted the appeal.

[281] Held, that there was, under the circumstances, no sufficient cause for the delay †.

An Appellate Court should not admit an appeal after the period of limitation prescribed therefor without recording its reasons for being satisfied that there was sufficient cause for not presenting it within such period.

THIS suit was dismissed by the Court of First Instance on the 26th July 1875. On that day the plaintiff applied for a copy of the Court's decree, which was furnished on the 31st July. On the 31st August she presented an appeal to the lower Appellate Court, but did not assign in her petition any cause for not presenting it within the period of limitation prescribed therefor by art. 151 sch. ii, Act IX of 1871. It was alleged, however, in special appeal, that her excuse was that she had miscalculated the period. The lower Appellate Court recorded simply that it should excuse the delay and admitted the appeal, and eventually gave the plaintiff a decree.

On special appeal by the defendant to the High Court it was objected that the lower Appellate Court was not competent to admit the appeal after the period of limitation ordinarily allowed by law without finding that the plaintiff had sufficient cause for not presenting it within such period, and that the cause alleged was not sufficient.

* Special Appeal, No. 478 of 1876, against a decree of the Judge of Allahabad, dated the 17th March 1876, reversing a decree of the Subordinate Judge, dated the 26th July 1875.

† For circumstances under which there was sufficient cause for delay in filing an appeal, see *The Secretary of State for India v. Mutu Sawmy* (4 B. L. R., App. 84; S.C., 18 W. R., 245); and *Surbhai Dayalji v. Raghu Nathji Vasanji* (10 Bom., H. C. R., 397), where, on appeal to the High Court against an order rejecting an appeal as being presented after the period of limitation prescribed therefor, sickness was pleaded as a cause for the delay, the Court refused to direct the lower Court to take evidence in the matter—*Petition of Masoom Ali Khan* (1 W. R., Mis., 23).

The Senior Government Pleader (Lala Juala Parshad) and Munshi Hanuman Parshad for the Appellant.

Babu Oprokash Chandar and Shah Assad Ali for the Respondent.

The Judgment of the Court, so far as it related to the above objections, was as follows :—

We admit the validity of these objections. Assuming the Judge considered the excuse now alleged for the delay in the presentation of the appeal in the Court below (of which there is no proof), [252] we cannot hold that an error in the calculation of the time allowed was, under the circumstances, sufficient cause for the delay. We decree the appeal, and, reversing the order of the lower Appellate Court, reject the appeal presented to the Judge on the ground that it was barred by limitation. The appellant will recover costs in this and the lower Appellate Court from the respondent.

NOTES.

[The mere probability of the High Court arriving at a different conclusion, were the matter *res integra* is no ground for disturbing the discretion exercised by the lower Court :—(1882) 6 Bom. 304.]

[1 All. 252.]

APPELLATE CIVIL.

The 26th June, 1876.

PRESENT :

MR. JUSTICE TURNER AND MR. JUSTICE SPANKIE.

Tulsi Ram and others.....Defendants

versus

Ganga Ram.....Plaintiff."

Act VIII of 1859, s. 7.

The fact that, at the time when the purchaser of certain lands sued, with a view of confirming his title to the lands under his purchase, for a decree declaring such title, he was in a position to have sued for possession of the lands, was no bar under the provisions of s. 7, Act VIII of 1859, to his subsequently suing for possession of the same.

THIS was a suit for the possession of certain lands and for the mesne profits of the same for three years. The suit was based on a deed of sale executed in the plaintiff's favour by Baldeo, the father of the defendants, on the 23rd of December 1862. The plaintiff had sued Baldeo on the 2nd of June 1864 for a declaration of his rights under the sale, on the ground that Baldeo had failed to fulfil his promise of putting him into possession of the lands, and had obtained a decree on a confession of judgment.

* Special Appeal, No. 572 of 1875, from a decree of the Subordinate Judge of Agra, dated the 20th May 1875, reversing a decree of the Munsif, dated the 20th March 1875.

The Court of First Instance dismissed the present suit on the ground that it was barred by s. 7, Act VIII of 1859. The lower Appellate Court was of a different opinion, and reversing the decree of the first Court, remanded the suit for a decision on the merits.

On special appeal by the defendants to the High Court it was again contended that the suit was barred by the provisions of that section.

Pandit Bisambar Nath and Munshi Sukh Ram for the Appellants.

The Senior Government Pleader (Lala Juala Parshad) and Pandit Ajudhia Nath for the Respondent.

[263] The Judgment of the Court was as follows :—

The plaintiff sued to obtain possession of 4 bighas, 12 biswas of land out of 92 bighas, 12 biswas, and one-fourth of 1 bigha, 11 biswas (jureebi), situate in Thoke Muhoor, Mauza Rahtori, together with mesne profits for three years.

It appears that, on December the 23rd, 1862, Baldeo, the father of the defendants, sold the lands in suit with other lands to the plaintiff, and with a view, it is said, of confirming his title, he in 1864 sued for and obtained a decree declaring his rights under the sale. It is admitted that he had not at the time of the institution of the declaratory suit and that he has not up to the present time obtained possession.

The defendants pleaded *inter alia* that the suit was barred by the provisions of s. 7, Civil Procedure Code. The Munsif allowed the plea and dismissed the suit without trial on the merits. The lower Appellate Court held that the suit was not barred and remanded it for trial under s. 351, Civil Procedure Code. The lower Appellate Court considered that s. 7 applies to cases in which the plaintiff omits to seek relief in respect of a portion of his claim, and not to cases in which, although he may be entitled to claim more than one kind of relief, he seeks for the time one remedy only.

In our judgment the lower Appellate Court has properly interpreted the provisions of the section referred to. We have not now to consider whether the plaintiff ought to have obtained a declaratory decree, seeing that he might have obtained that relief in an ordinary suit for possession. We have to determine whether, in seeking a declaratory decree to establish his purchase-deed, and omitting to sue for possession, he can be held to have omitted any portion of the claim arising out the cause of action he then put in suit. The cause of action he then put in suit did not necessarily involve any breach of the contract to deliver possession. The plaintiff might have obtained a declaratory decree without entering on the question of possession. For these reasons we hold that s. 7 is inapplicable, and we consequently affirm the order of the lower Appellate Court and dismiss the appeal with costs.

NOTES.

[See 8 Cal. 483.]

[284] APPELLATE CIVIL.

The 26th June, 1876.

PRESENT :

MR. JUSTICE TURNER AND MR. JUSTICE SPANKIE.

Timalkuari.....Plaintiff

versus

Ablakh Rai and others.....Defendants.*

Act XVIII of 1873—Act IX of 1871, s. 15—Limitation.

Sembly, that the provisions of s. 15, Act IX of 1871, are not applicable to suits or applications under Act XVIII of 1873.

THIS was a case stated by an Assistant Collector of the first class for the opinion of the District Judge. The case was as follows :—

The plaintiff was illegally ejected from certain land in or before the year 1873, and in January 1876 made an application under s. 95, cl. (n), of Act XVIII of 1873 to recover possession of the same. The defendants raised the objection that, under cl. (e), s. 96, Act XVIII of 1873, applications under cl. (n), s. 95, could not be brought after six months from the date of wrongful dispossessing, but as it appeared that the plaintiff had spent the time intervening between the date of his dispossession and the date of his application, prosecuting suits, for the recovery of the land, instituted by him in Courts which had no jurisdiction to try such suits, the Assistant Collector referred to the District Judge the question whether the provisions of s. 15, Act IX of 1871, apply to applications under Act XVIII of 1873 or not ?

The District Judge decided that they did not apply either to suits or applications, relying on *Nona v. Dhoomun Dass* (H. C. R., N.-W. P., 1873, p. 30), and *Madhoo Soodun Mojoondar v. Brojonath Koond Chowdhry* (5 W. R., Act X Rulings, 44).

The plaintiff appealed against this decision to the High Court, contending that the Assistant Collector was not competent to make a reference under s. 204, Act XVIII of 1873, and that the decision was erroneous.

Mr. Conlan and Babu Baroda Parshad for the Appellant.

Lala Lalita Parshad for the Respondent.

[285] The Judgment of the Court was as follows :—

The appellant rightly contends that the Assistant Collector had no power to make the reference, and that consequently the Judge's opinion cannot be regarded as authoritatively binding on the Assistant Collector and the parties to the proceeding. It is not necessary for us to go on to consider the validity of the second plea, but we may notice that the opinion recorded by the Judge appears to be in conformity with the ruling of the Privy Council in *Unmoda*

* Miscellaneous Regular Appeal, No. 96 of 1876, against a judgment of the Judge of Ghazipur, dated the 21st February 1876.

Persaud Mookerjee v. Kirsto Coomar Moitro (15 B. L. R., 60 note; S. C., 19 W. R., 5; adopting the view taken by the Full Bench of the Bengal High Court in their decision in *Poulson v. Madhusudan Pal*, B. L. R., Sup. Vol. 101; S. C., 2 W. R., Act X Rulings, 21), in which it was held that the analogous provisions of s. 14, Act XIV of 1859, do not apply to suits instituted under Act X of 1859, because the latter is a special law. On similar grounds it was ruled in *Mahomed Bahadur Khan v. The Collector of Bareilly* (L. R. 1 Ind. App. P. C. 167; S. C., 13 B. L. R., 292) that the provisions of the Limitation Law relating to disability do not apply to enlarge the period of limitation prescribed by Act IX of 1859. We must, however, declare the reference to the Judge has no legal effect and his opinion cannot be held binding on the parties. We order the Judge to return the reference to the Assistant Collector, that it may be submitted through the proper channel should the Collector think fit to make a reference, and we shall direct each party to bear his own costs.

[1 All. 255]

FULL BENCH.

The 28th June, 1876.

PRESENT:

SIR ROBERT STUART, K.T., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, MR. JUSTICE SPANKIE, AND
MR. JUSTICE OLDFIELD.

Sham Kuar and others.....Defendants.

versus

Gaya Din and another.....Plaintiffs.*

Hindu Law—Adoption—Inheritance.

An adopted son under the Dattaka Mimansa and Mitakshara succeeds to property to which his adoptive mother succeeded as the heiress of her father (*see*, however, besides the cases cited afterwards, *Chinnaramakristna Ayyar v. Minatchi Ammal*, 7 Mad. H. C. R., 245).

[256] THE plaintiffs in this suit were the sons of Sheodat Singh, the adopted son of Ramdat Singh, the deceased husband of Birja Kuar, deceased. They claimed a declaration of their right to, and possession of, certain shares in certain villages which Birja Kuar had inherited from her father Lotan Singh, in virtue of a will which Birja Kuar had executed in their favour, with the consent of their father, and in virtue of their father's right of succession, under Hindu Law, to the property of Birja Kuar, his adoptive mother. The defendants were descended from other daughters of Lotan Singh.

The Court of First Instance dismissed the suit. On appeal by the plaintiffs the lower Appellate Court gave them a decree.

* Special Appeal, No. 923 of 1875, against a decree of the Judge of Asamgarh, dated the 11th June 1875, reversing a decree of the Subordinate Judge, dated the 18th January 1875.

On special appeal by the defendants to the High Court, the Court (TURNER and SPANKIE, JJ.) referred the following question to the Full Bench, *viz.*—

"Whether an adopted son is entitled to succeed to property which descended to the wife of the adopting father as the heiress of her father."

Lala *Lalta Parshad* and Munshi *Kashi Parshad* for the Appellants.

The Senior Government Pleader (*Lala Juala Parshad*) and Munshi *Hanuman Parshad* for the Respondents.

The Opinion of the Full Bench was as follows :—

Looking to the object of the rite of adoption, we find it to be to ensure by providing a son the spiritual benefit of the adoptive father and the perpetuation of his family name (Dattaka Mimansa, ss. 1-9), rather than to obtain any benefit for the adoptive mother, whose happiness in a future state is not so dependent on having a son to perform the funeral obsequies and can be otherwise secured (Dattaka Mimansa, s. 1., v. 29), and it is also the fact that the wife has no power to adopt on her own account, the right being absolute in the husband. Such being the case, there is no doubt at first sight much force in the contention that the adoption of a son merely affiliates him in the family of the adoptive father, and not of the adoptive mother, and that he cannot in consequence succeed by inheritance to the property which descended to his adoptive mother [287] as heiress of her father. But on the other hand we find that the wife is associated in making the adoption with the husband, and its effect is declared to be to make the adopted child the son of the adoptive mother as well as of the adoptive father.—"By the husband's mere act of adoption the filiation of the adopted son, as son of the wife, is complete in the same manner as her property in any other thing accepted by the husband"—Dattaka Mimansa, s. 1. v. 22. Nowhere do we find it stated that there is any difference in the effect obtained by this filiation with reference to the son's position towards the adoptive father and mother or their families, while we know that in respect of the natural father and mother the effect is alike to completely sever the adopted son from the families of both.—"A given-son must never claim the family and estate of his natural father. The funeral cake follows the family and estate, but of him who has given away his son the obsequies fail"—Dattaka Mimansa, s. 6, v. 6. "The estate of the maternal grandfather also like that of the father lapses from the son given"—Dattaka Mimansa, s. 6, v. 51. When the separation is so complete from the natural father and mother's family in the absence of texts to the contrary, it may perhaps be not assuming too much to infer that the affiliation by adoption is into both families of adoptive father and mother. But we have what seems to be an express text to that effect. Dattaka Mimansa, s. 6, v. 50 declares—"The forefathers of the adoptive mother only are also the maternal grandsires of sons given, and the rest: for the rule regarding the paternal is equally applicable to the maternal grandsires of adopted sons." There is also another fact which affords the strongest argument in favour of the adopted son's right of succession, and this is that he has the right to perform funeral obsequies to his adoptive mother's father. In Dattaka Mimansa, s. 6, vv. 52, 53, we find—"Accordingly Hemadri himself, from not being satisfied with that (just stated), has advanced the other position: 'In the same manner as for the secondary father, a funeral repast must be performed in honour of the secondary maternal grandfather and the rest.' And this even is proper. The adopted son as substitute for the real legitimate son being the agent of rites performed by a legitimate

son, it follows that he is the performer of funeral repasts, the objects of which are the manes in honour of whom a legitimate son performs [258] such repast." This right of performing the obsequies indicates a right of heirship in the family of the adoptive mother. We have seen the rule laid down by Manu to be—"A given-son must never claim the family and estate of his natural father," and the reason assigned is because "the funeral cake follows the family and estate," and the same reason is assigned in v. 51, s. 6, Dattaka Mimansa, why the given-son cannot claim the estate of his natural maternal grandfather — the funeral cake follows the family and estate'; "the family and estate are declared to be the cause of performing the funeral repast." So when we find that the adopted son performs by right the obsequies of his adoptive maternal grandfather, it will follow that he does so because he is amongst the heirs, or to quote the text, because "the family and estate are the cause of performing the funeral obsequies," and this doctrine of funeral cake has been held by a high authority (Sir W. Jones) to be the key to the whole Hindu Law of inheritance.

Amongst decisions on the question, we find that in *Morun Moyee Debeah v. Bejoy Kishto Gossamee* (W. R., F. B., 121), decided the 23rd July 1863, the High Court of Bengal held that an adopted son cannot succeed to his adoptive maternal grandfather's estate when there are collateral male heirs.

There is the case of *Gunga Mya v. Kishen Kishore Chowdhry* (3 S. D. A. Rep., L. P., 128) decided the 17th December 1821, in which a *vyavastha* was delivered to the effect that a son adopted with the permission of her husband by a woman on whom her father's estate had devolved will not be entitled to such estate on his adoptive mother's death, but such estate will go to her father's brother's son in default of nearer heirs. This opinion was based on an interpretation given by the Dayabhaga to the text of Manu by which the adopted son's right of succession collaterally was confined to succession to property of persons belonging to the same family as the adopting father. But that dictum was accepted by one Judge only, and the majority of the Court expressed no opinion on it, as the point did not arise in the case. The dictum has, however, been accepted by Mr. Macnaghten—Hindu Law, vol. ii., 187. [259] Then there is the case of *Gungapersad Roy v. Brijessuree Chowdhry* (15 S. D. A. Rep., L. P., part ii, p. 1091), decided by the High Court of Bengal on the 30th July 1859, in which the learned Judges considered that the doctrine laid down in the case of *Gunga Mya v. Krishen Kishore Chowdhry* stood merely as the dictum of the Pandit who gave it, and had not been conclusively adopted by the Court and could not be said to have acquired all the authority of a recognised principle of Hindu Law to which the Sudder Court had intended to give effect, and the Court proceeded to decide the question before them, which was the converse of that before us, and held that the relations of the adoptive mother inherit the property of her adopted son just as they would inherit the property of her natural son.

In another case, *Teencowree Chatterjee v. Dinnonath Banerjee* (3 W. R. 49) the right of inheritance by the adopted son was held to be limited to the adoptive mother's stridhan, and did not extend to the property she had inherited from her father and paternal ancestors, but this limitation of the succession proceeded on the ground that the adopted son cannot perform the shradh of the adoptive mother's father, in which view the Court appears to have been mistaken.

Referring again to the decision in *Morun Moyee Debeah v. Bijoy Kristo Gossamee*, it should be noticed that in that case the Pandits of Moorshedabad

and the Sudder Court gave their opinion that a legally adopted son can inherit the property of the adopting mother's father. They thus differed from the dictum given in 1821, and it should be also noticed that this *vyavastha* of 1821, on which the Judges in *Morun Moyee Debeah v. Bijoy Kristo Gossamee* principally relied, has special reference to the Dayabhaga law, and will not have equal weight in deciding the question before us, which must be governed by the Dattaka Mimansa and Mitakshara.

On a full consideration of the question there seems no valid reason to doubt that the adopted son does succeed to property which descended to his adoptive mother as heiress of her father.

NOTES.

[See 6 Cal. 256.]

[260] APPELLATE CIVIL.

The 29th June, 1876.

PRESENT :

MR. JUSTICE TURNER AND MR. JUSTICE SPANKIE.

Jagan Nath.....Defendant
versus
 Lalman.....Plaintiff.*

Act VIII of 1859, s. 336—Appeal when instituted—Memorandum of Appeal—Limitation.

Where, under the provisions of s. 336,[†] Act VIII of 1859, a memorandum of appeal is returned for the purpose of being corrected, the Appellate Court should specify a time for such correction.

Where an appellant presented an appeal within the period of limitation prescribed therefor, and the Appellate Court returned the memorandum of appeal for correction without specifying a time for such correction, the appeal again presented some days after the period of limitation was presented within time, the date of its presentation being the date it was presented.

THE period for presenting an appeal in the suit against the decree of the Court of First Instance expired on the 18th December 1875. The defendant presented an appeal on the 16th December. The lower Appellate Court returned the memorandum of appeal for the purpose of being corrected without specifying any time within which the appeal should be again presented. It was again presented

* Special Appeal, No. 561 of 1876, from a decree of the Judge of Farukhabad, dated the 29th February 1876, rejecting an appeal against a decree of the Subordinate Judge, dated the 16th November 1875.

† Sec. 336 :—If the memorandum be not drawn up in the manner hereinbefore prescribed, the Court may reject it or may return it to the party for the purpose of being corrected. If the memorandum be not presented within the prescribed period, and no sufficient cause be shown for the delay, the appeal shall be rejected.]

on the 22nd December and admitted. At the hearing the plaintiff objected that it was presented after time. The lower Appellate Court admitted the validity of the objection, deciding that the date on which it was presented the second time must be taken to be the date of its presentation, for the purpose of computing the period of limitation, and holding that the defendant had shown no sufficient cause for not presenting it within time, dismissed it as barred by limitation.

Against this decision the defendant appealed to the High Court.

Pandit Ajudhia Nath for the Appellant.

Pandit Bishambar Nath and Lala Harkishen Das for the Respondent.

The Judgment of the Court was as follows:—

We are unable to hold that the appeal was presented after the proper time, for the date of its presentation is the date on which it is first presented to the officer. In returning the application that [261] the grounds of appeal might be amended, the Judge should have prescribed a time within which it should have been again presented in an amended form. The case of *Ismail Sahib v. Arumuga Chetti* (1 Mad. H. C. R., 427; see also *Hidayut Ali v. Maeraj Begum*, H. C. R., N.-W. P., 1871, p. 202; *Begee Begum v. Yusuf Ali*, H. C. R., N.-W. P., 1874, p. 139; *Sham Chand Koondo v. Kally Kanth Roy*, Marsh 336; *Ram Coomar Shaha v. Dwarkanath Hazra*, 5 W. R., 207; *Husrutoorah v. Abdool Kadir*, 6 W. R., 39; *Greesh Chunder Singh v. Ram Kishen Bhattacharjee*, 7 W. R., 157; *Mengur Munder v. Huree Mohun*, 23 W. R., 447; and see also the Indian Limitation Act, s. 4, Explanation) appears to be in point. The decree of the lower Appellate Court is set aside and the case remanded under s. 351 for trial by the lower Appellate Court.

[7 Mad. 261.]

APPELLATE CIVIL.

The 29th June, 1876.

PRESENT:

MR. JUSTICE TURNER AND MR. JUSTICE SPANKIE.

Tota Ram.....Defendant

versus

Sher Singh and others.....Plaintiffs.*

Act XVIII of 1873, s. 93, cl. (h)—Suit for Profits—Interest.

A Court of Revenue is competent, in a suit for profits, under s. 93, cl. (h) of Act XVIII of 1873, to award the interest claimed on such profits.

THIS was a suit under cl. (h), s. 93, Act XVIII of 1873, by five co-sharers to recover from the remaining co-sharer five-sixths of the profits, together with interest, of a certain mahal for 1280 Fasli. The Court of First Instance gave them a decree for the whole sum claimed. The lower Appellate Court affirmed that decree.

* Special Appeal, No. 559 of 1876, against a decree of the Judge of Meerut, dated the 29th February 1876, affirming a decree of the Assistant Collector, dated the 27th August 1875.

One special appeal by the defendant to the High Court it was contended that the Court of first instance was not competent to give a decree for the interest claimed, the defendant not being liable under any provisions of Act XVIII of 1873 to pay interest.

Munshi *Hanuman Parshad* and Pandit *Bishambar Nath* for the Appellant.
Babu *Jogendro Nath* for the Respondents.

[262] The Judgment of the Court, so far as it is material to the above contention, was as follows :—

It is true that the Rent Act does not expressly declare that interest will accrue on other sums which may be recovered in the Revenue Court except sums due in respect of rent, but neither does it declare the Revenue Courts incompetent to award interest, and it would be contrary to the policy of the Act to compel a plaintiff to resort to the Civil Court to obtain compensation in the way of interest for the default in payment of sums which are only recoverable in the Revenue Courts. As it has been the practice in the Revenue Courts to decree interest on arrears of profits, we shall not interfere with the decree of the Court below in this respect.

[1 All. 262.]

APPELLATE CIVIL.

The 29th June, 1876.

PRESENT :

MR. JUSTICE TURNER AND MR. JUSTICE SPANKIE.

Gauri.....Plaintiff

versus

Chandramani.....Defendant.*

Hindu law—Hindu widow—Family dwelling-house—Right of residence.

A Hindu widow, who resides with her husband and the members of his family in the family dwelling-house while he is alive, is entitled to reside therein after his death, and cannot be ousted by the auction-purchaser of the rights and interests in the house of her husband's nephew.

• *Mangala Devi v. Dinanath Bose* (4 B.L.R., O.J., 72; S.C., 12 W.R., O.J., 35) followed. [See, however, *Mohun Geer v. Tota* (H.C.R., N.-W.P., 1872, p. 158).]

THE plaintiff in this suit was the auction-purchaser of the rights and interests in a certain dwelling-house of his judgment-debtor, Bindesri Parshad.

Bindesri Parshad was the son of Lachman Parshad, deceased, and nephew of Beni Parshad, also deceased.

When the plaintiff endeavoured to obtain possession of the house he was resisted by the defendant, the childless widow of **[263]** Beni Parshad, who was

* Special Appeal, No. 469 of 1879, against a decree of the Subordinate Judge of Gorakhpur, dated the 17th February 1876, reversing a decree of the Munsif, dated the 30th November 1875.

residing in the house, and claimed the right to reside in a moiety thereof as her husband's widow. He therefore brought the present suit to eject her.

The Court of first instance gave him a decree. The lower Appellate Court held, on the ground that a moiety of the house was admittedly the separate property of Beni Parshad, that the defendant was entitled to the right of residence claimed by her, and dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

Lala Lalta Parshad for the Appellant.

The respondent did not appear.

The Judgment of the Court was as follows :—

It does not appear to have been admitted that the property was held by Lachman Parshad and Beni Madho in equal shares, but assuming it was the joint property of the two brothers, the widow of Beni Madho is entitled to live in it, it being the house in which she resided with her husband. She cannot be ousted by a purchaser of her nephew's right. *Mangala Debi v. Dinanath Bose* (4 B. L. R., O. J., 72; S. C., 12 W. R., O. J., 35). The house is a small one, and it is not shown that one moiety is more than sufficient as a residence for the Mussammat. We shall not therefore disturb the decree of the lower appellate Court, but dismiss the appeal with costs.

NOTES.

[As to the right of residence, see the learned judgment of Muttusami Ayyar, J in (1888) 12 Mad., 260 F. B. where previous authorities on the subject are fully discussed. See also 27 Mad., 48; 13 Bom., 101; 2 Bom., 494; 3 All., 353; 2 All., 141.]

[1 All. 263]

APPELLATE CIVIL.

The 30th June, 1876.

Bishan Chand.....Defendant

versus

Ahmad Khan and others.....Plaintiffs.

Act IX of 1871, s. 5 a—Institution of suit—Limitation.

Held, that where the period of limitation prescribed for a suit expired when the Court was closed for a vacation, and the Court, instead of re-opening after the vacation on the day that it should have re-opened, re-opened on a later day, and the suit was instituted when it did re-open, it was instituted within time.

[264] THIS suit was instituted in the Court of the Subordinate Judge of Ghazipur on Monday, the 16th November 1874. The cause of action was stated in the plaint to have arisen on the 2nd November 1871.

* Special Appeal, No. 534 of 1876, from a decree of the Judge of Ghazipur, dated the 19th April 1876, reversing a decree of the Subordinate Judge, dated the 12th June 1875.

The Subordinate Judge dismissed the suit, holding that the period of limitation applicable to it was two years. On appeal by the plaintiffs the District Judge held that the period applicable was three years, and that, as that period expired when the Court of the Subordinate Judge was closed, and the plaintiffs had instituted the suit on the day the Court re-opened, it was instituted within time.

The Court of the Subordinate Judge was closed from the 12th October 1874 to the 13th November 1874, in accordance with a list of days to be observed as close holidays in 1874 by the Courts subordinate to the High Court, such list being prepared by the High Court and published in the local Gazette, under the provisions of s. 17, Act VI of 1871. It should have re-opened on Saturday the 14th November 1874, but did not do so until Monday the 16th November 1874, under an order issued by the District Judge.

On special appeal by the defendant to the High Court it was contended that the suit was barred by limitation, not having been instituted on the 14th November 1874.

Munshi Hanuman Parshad and Pandit Ajudhia Nath for the Appellant.

Pandit Bishambar Nath and Shah Assad Ali for the Respondents.

The Judgment of the Court, so far as it is material to the above contention, was as follows:—

It appears that the Court should have sat on the 14th November 1874, and if it had done so, the suit, according to the Judge's [265] view of the limitation that applies, would have been within time. The Judge does not notice the fact that the Court did not sit on the 14th, but confines his remarks to the point that, when the Court opened, the petition was filed, and the limitation being three years, not two years as found by the first Court, the suit was within time. It was contended that the Courts did not sit because the Judge had issued an unauthorized order that they were not to open until the Monday following Saturday the 14th, on which day they should have been opened after the close of the vacation. The Judge's unauthorized order cannot, it is urged, override the law of limitation, which must be applied strictly. It does not appear why this order was issued; probably it was to suit the convenience of the Judges on their return to their Courts after the vacation, because Sunday caused another break between Saturday and Monday. There was considerable difference of opinion before the passing of the present Limitation Law, as to whether Act XIV of 1859 was to be strictly applied in a case of this nature when a Court happened to be unexpectedly closed. [In the following cases it was held that a plaintiff was not entitled to deduct the time the Court was closed from the period of limitation applicable to his suit under Act XIV of 1859, that Act giving no discretion to the Court to extend such period—*Rajkristo Roy v. Dinobundho Surma* (B. L. R., Sup. Vol., 360; s. c., 3 W. R., S. C. C. R., 5); *McKilligan v. Tarinee Churn Singh* (3 W. R., 209); *Kudomessuree Dossee v. Enam Ali*, (20 W. R., 167); *Ramasamy Chetty v. Venkatachellapatty Chetty* (2 Mad., H. C. R. 408). In *Manirun v. Luteefun* (3 W. R., 46), it was held otherwise. Where the time fixed by the decree in a suit for pre-emption for the deposit of the purchase-money expired when the Court was closed, its deposit when the Court re-opened was held to have been made within time—*Muchul Kooer v. Laljee* (H. C. R., N.-W. P. 1870, p. 112)]. In the present case the plaintiff appears to have brought his claim to the Munsifi and to have been ready to

present it on the 14th. It is dated the 14th, so is the vakalatnama and the plaint was presented on Monday the 16th. In such a case we should not be disposed to apply the strictest interpretation, and looking at the terms of s. 5, cl. (a), Act IX of 1871, we do not think that we are called upon to do so. The section provides that, if the period of limitation prescribed for any suit, appeal, or application expires on a day when the Court is closed, the suit, appeal, or application may be instituted, presented, or made on the day that the Court re-opens. This was the course followed in the case before us, and the section appears to us wide enough, since it does not refer to vacations or holidays, to admit of the entertainment of the suit.

[266] APPELLATE CIVIL.

The 7th July, 1876.

PRESENT :

MR. JUSTICE TURNER AND MR. JUSTICE SPANKIE.

Ram Golam and others.....Defendants

versus

Sheo Tahal and others.....Plaintiffs.*

Decree—Judgment—Appeal.

The plaintiffs in this suit claimed, as the heirs of *G*, possession from the defendants of certain lands which *G* had mortgaged to the defendant, alleging that the mortgage-debt had been satisfied from the usufruct. The defendants denied the title of the plaintiffs to redeem, asserting also that the mortgage-debt had not been satisfied. The Court of first instance held that the plaintiffs were entitled to redeem, but dismissed the suit on the ground that the mortgage-debt had not been satisfied.

Held, that the defendants were entitled to appeal, the case of *Pan Kooer v. Bhugwunt Kooer* (H. C. R., N. W. P., 1874, p. 19) not being applicable to this case.

THE plaintiffs in this suit claimed, as the heirs of Gunnu Dubay, to recover possession from the defendants of certain lands which Gunnu Dubay had mortgaged to their ancestor in 1835 for Rs. 25, alleging that the mortgage-debt had been satisfied from the usufruct. They also claimed mesne profits.

The defendants denied that the plaintiffs were the heirs of Gunnu Dubay, asserting that they themselves were his heirs, and that they held possession of the lands in suit as such, having originally held possession of them under the mortgage. They also denied that the mortgage-debt had been satisfied from the usufruct.

The Court of first instance found that the plaintiffs were the heirs of Gunnu Dubay, but dismissed the suit on the ground that the mortgage-debt had not been satisfied. Its decree was in these terms :—“It is ordered that the plaintiffs’ claim be dismissed in its present form.”

* Special Appeal, No. 554 of 1876, against a decree of the Judge of Ghazipur, dated the 17th February 1876, affirming a decree of the additional Subordinate Judge, dated the 8th April 1875.

The defendants appealed impugning the decision of the Court of first instance that the plaintiffs were the heirs of Gunnu Dubay. The lower Appellate Court dismissed the appeal on the ground that [267] it was an appeal against the decision of the Court of first instance and not the decree, referring to *Pan Kooer v. Bhugwant Kooer* (H. C. R., N.-W. P., 1874, p. 19). On special appeal by the defendant to the High Court it was contended that the lower appellate Court had misapplied that case.

Mir Akbar Hussain for the Appellants.

The Senior Government Pleader (Lala Juala Parshad), for the Respondents.

The Judgment of the Court was as follows :—

We are of opinion that the ruling of the Full Bench does not apply in this case. The appellant is dissatisfied with the decree of the Court of first instance. He contends that the respondents have, under no circumstances, a right to redeem, and that their suit should have been dismissed absolutely and not in such a manner that they are at liberty to come into Court again. We admit the force of the objection, and decreeing the appeal, remand the case to the lower appellate Court for decision on the merits.

NOTES.

[See 2 All. 497 : 17 All. 174 ; 9 C. W. N. 585.]

[1 All. 267].

FULL BENCH..

The 27th July, 1876.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, MR. JUSTICE TURNER,
MR. JUSTICE SPANKIE, AND MR. JUSTICE OLDFIELD.

Anant Das.....Defendant

versus

Ashburner and Co.....Plaintiffs.*

Act IX of 1872 (Contract Act), s 28—Agreement not to appeal—Void agreement.

Where, in consideration of A giving B time to satisfy a decree against him held by A, B agreed not to appeal against the decree and did appeal, held that the agreement was not prohibited by s. 28† of Act IX of 1872, and that the Appellate Court was bound by the rules

* Regular Appeal, No. 109 of 1875, against a decree of the Subordinate Judge of Gorakhpur, dated the 10th July, 1875.

†[Sec. 28 :—Every agreement, by which any party thereto restricted absolutely from enforcing his rights—under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

LL.R. 1 All. 268 ANANT DAS v. ASHBURNER & CO. [1876]

of justice, equity, and good conscience to give effect to it and to refuse to allow *B* to proceed with the appeal which he had instituted in contravention of it.

Ashburner and Co., the respondents in this appeal, had obtained a decree against Anant Das, the appellant. On the 24th July 1875, while certain proceedings in execution of that decree were pending, Anant Das entered into an agreement with Ashburner and Co. by which he bound himself not to appeal from the decree if they would give him until the 20th September, 1875, to satisfy it. The agree-[268]ment and consent having been notified by the parties to the Court executing the decree, it directed execution to be stayed.

Anant Das contrary to the agreement above-stated preferred the present appeal to the High Court. The respondents urged, when it came on for hearing, that it ought not to be entertained. The appellant contended that the agreement was void under the provisions of s. 28,* Act IX of 1872.

The Court (TURNER and OLDFIELD, JJ.), being doubtful whether the terms of that section applied, referred to the Full Bench the question whether, under the circumstances stated, the appellant ought to be allowed to proceed with the appeal.

The Senior Government Pleader (*Lala Juala Parshad*), for the appellant, contended that the agreement was void under s. 28, Act IX of 1872.

Mr. Howard (with him the Junior Government Pleader (*Babu Dwarka Nath Banarji*)) for the respondents, contended that the section was not applicable. The agreement is a valid agreement, and the consideration *viz.*, the granting of time, good and sufficient. He referred to *Munshi Ali v. Maharani Inderjit Koer* (9 B. L. R., 460).

Stuart, C J.—I would answer this reference in the negative. It is perfectly clear that s. 28 of the Contract Act does not apply to such a case, while in my judgment the agreement of the 24th July, 1875, was a valid and reasonable arrangement which can be enforced. The appellant therefore ought not to be allowed to proceed with his appeal.

Turner, Spankie and Oldfield, JJ., concurred in the following opinion:—

Section. 28, Act IX of 1872, declares that every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals is void to that extent. These provisions appear to embody a general rule recognised in the English Courts which prohibits all agreements purporting to oust the jurisdiction of the Courts; but notwithstanding this rule it was long since determined that, if a person after mature deliberation enters into an agreement for the purpose of compromising a claim *bond fide* made to which he believes himself to be liable, and with the nature and extent of which he is fully acquainted, the compromise of such a claim is a sufficient consideration for the agreement, and the agreement is valid. This principle has been recognised in the Indian law in the provisions of the Procedure Code, which enable the parties to a suit to go before the Court and obtain a decree in the terms of a compromise. Furthermore, that the parties to a suit may before a decision is passed in the Court of first instance agree to abide by the decision of that Court and forego their right of appeal is shown by the decision of the Privy Council in *Munshi Amir Ali v. Maharani Inderjit Koer* (9 B.L.R., 460). That case was, it is true, decided before the Indian Contract Act was

* [q. v. supra 1 All. 267.]

passed, but if, as we are of opinion, the provisions on which the appellant relies only declare what was before a recognised rule of law, it is an authority in favour of the conclusion at which we have arrived, that those provisions are not applicable to the circumstances of the present case. By the agreement not to appeal, for which the indulgence granted by the respondents was a good consideration, the appellant did not restrict himself absolutely from enforcing a right under or in respect of any contract. He forewent his right to question in appeal the decision which had been passed by an ordinary tribunal. Such an agreement is, in our judgment, prohibited neither by the language nor the spirit of the Contract Act, and an appellate Court is bound by the rules of justice, equity, and good conscience to give effect to it and to refuse to allow the party bound by it to proceed with an appeal.

NOTES.

[See 3 All., 152; 8 Cal., 455.]

[1 All. 269]

APPELLATE CIVIL.

The 27th July, 1876.

PRESENT:

MR. JUSTICE TURNER AND MR. JUSTICE OLDFIELD.

The Municipal Committee of Moradabad.....Defendants

versus

Chatri Singh.....Plaintiff.*

Act XV of 1873 (North-Western Provinces and Oudh Municipalities Act), ss. 28, 43—Local Government—Notice of suit—Special appeal.

Where, in a suit against a Municipal Committee, the Magistrate of the District was impleaded as representing the Local Government, the Court refused to [270] allow the plea that the Local Government had not been made a party to the suit in accordance with the provisions of s. 28, Act XV of 1873.

The notice previous to suing a Municipal Committee for a thing done by them under that Act required by s. 43 of the Act is only necessary where compensation is claimed for the thing done.

The plea that no notice was given as required by s. 43 cannot be taken for the first time in special appeal.

Quere.—Whether a plea that the Local Government has not been made a party to a suit against a Municipal Committee in accordance with s. 28 can be taken for the first time in special appeal.

* Special Appeal, No. 841 of 1876, against a decree of the Subordinate Judge of Moradabad, dated the 7th January 1876, reversing a decree of the Munsif, dated the 30th September 1874.

ONE Dhokal Singh complained to the Magistrate that the plaintiff was encroaching on a certain public highway in the Municipality of Moradabad. The Municipal Committee took the matter up, and in the carrying out of a resolution by them the line of the highway was marked out so as to admit of the passage of carts. The plaintiff instituted the present suit against Dhokal Singh and against the Magistrate of the District or President of the Municipal Committee and as representing the Local Government, in which he claimed to be maintained in possession of the piece of land which he alleged would be cut off his property if the highway were carried along the line marked out. The Court of first instance dismissed the suit, holding that the plaintiff had failed to prove his title to the land. The lower appellate Court, holding that the land was the plaintiff's property, gave him a decree.

On special appeal to the High Court by the Magistrate as President of the Municipal Committee, it was urged that the suit should be dismissed as the Local Government had not been made a party thereto in accordance with the provisions of s. 28, Act XV of 1873, and that the suit was not maintainable because notice of action was not given in accordance with s. 43 of that Act.

The Senior Government Pleader (*Lala Juala Parshad*) for the Appellant.

Pandit Bishambar Nath and Mir Zahur Hussain for the Respondent.

The Judgment of the Court, so far as it is material to the above contention, was as follows :—

A plea was, however, urged which is not entered in the memorandum of grounds of appeal that the suit ought to be dismissed on [271] the ground that the Local Government had not been made a party in accordance with the provisions of s. 28, Act XV of 1873. Inasmuch as in a former case (unreported) this objection had been allowed in special appeal and the suit remanded to the Court of first instance for retrial after adding the Local Government as defendant, we permitted the plea to be argued although it was not entered in the memorandum. In the present instance it appears to us that the plea should not be allowed. It is the practice to implead the Collector as representing the Local Government. The Collector and the Magistrate are one and the same person, and in this suit the Magistrate was impleaded not only as President of the Municipal Committee, but as representing the Local Government.

At the most it appears to us in this case there was a misdescription of the officer representing Government, a misdescription which that officer might have applied to have corrected. Consequently, assuming that it would be a valid plea in special appeal that the Government must necessarily have been impleaded, and on this point we must not be taken to express an opinion, we hold that the plea cannot arise in this suit because the Government was impleaded.

The question which next calls for decision is whether or not the suit should be dismissed because notice of action was not given in pursuance of s. 43 of the Act. This plea was not, it appears, raised in either of the Courts below, and it is not a plea affecting the decision on the merits. It therefore can hardly be held to be a good plea in special appeal. We may, however, observe that a plea based on similar provisions in a former Act was considered by the Court in an unreported case. It was then pointed out that, on the construction of analogous provisions in English Statutes, it had been held that notice of action is only necessary where the suit is brought for a tort or a quasi tort—Addison on Torts (4th ed., 764)—and that in '*Poorno Chunder Roy v. Balfour*' (9 W. R., 535; see

also *Price v. Khilat Chandra Ghose*, 5 B. L. R., App. 50). Mr. Justice PHEAR expressed his opinion that similar provisions in Act III of 1864 (B. C.) "were directed solely to the cases of suits brought against Commissioners for damages consequential on the act done by them"; and seeing [272] that the suit then before the Court was not brought for damages, the Court held that the provisions of s. 31, Act VI of 1868, respecting notice of action were inapplicable to it. We agree with that ruling. The object of requiring such notice appears to be to enable the committee or those acting under them to tender compensation and so prevent the necessity for a suit. In the suit now before the Court no damages are claimed. For the reasons we have stated we disallow the plea.

NOTES.

[See also 28 All. 600; 4 All. 102; 25 Bom. 142; 22 Bom. 289; 16 Mad. 296.]

[1 All. 272]

APPELLATE CIVIL.

The 3rd August, 1876.

PRESENT:

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND
MR. JUSTICE OLDFIELD.

Farzand Ali.....Defendant

versus

Alimullah.....Plaintiff.*

Act XXIII of 1861, s. 14—Pre-emption—Pattidari Estate—Co-sharer—Stranger—Auction-purchaser.

A share-holder in one patti of a pattidari estate is not a "stranger" with reference to a share-holder in another patti of the estate, within the meaning of that term in s. 14,† Act XXIII of 1861.†

The auction-purchaser at a sale in execution of a decree of a share in a pattidari estate seeking to establish his right as against a person whose claim to the right of pre-emption under the provisions of s. 14, Act XXIII of 1861, has been allowed and in whose favour the sale has been confirmed, cannot maintain a suit for possession of the share, but should sue for a

* Special Appeal, No. 318 of 1876, from a decree of the Judge of Ghazipur, dated the 21st January 1876, reversing a decree of the Munsif, dated the 16th September 1875.

†[Sec 14 :—When the land sold in execution of a decree is a share of a pattidari estate

paying revenue to Government as defined in Section II, Act I., of 1841 (*for facilitating the collection of the Revenue of Government and defining the interest intended to be conveyed by public sales for the realization of arrears of the Public Revenue in Pattidari Estates*), if the lot shall have been knocked down to a stranger, any co-sharer, other than the judgment-debtor or any other member of the co-parcenary, may claim to take the share sold

at the sum at which the lot was knocked down. Provided that the claim be made on the day of sale, and that the claimant fulfil all the conditions of the sale.]

declaration that the person claiming the right of pre-emption has no such right and to set aside the sale (see *Tasudak Ali v. Mukund Ali*, H. C. R., N.-W. P., 1874, p. 272; *Dabee Pershad v. Bisheshur Pershad Singh*, H. C. R., N.-W. P., 1874, p. 289; and *Shib Sahai v. Thika Ram*, H. C. R., N.-W. P., 1875, p. 97.)

THIS was a suit for a declaration of the plaintiff's right to, and to obtain possession of, a certain share in a pattidari estate. The share had been knocked down at a sale in execution of decree to the plaintiff, who was a co-sharer in the estate, but not a co-sharer in the patti in which the share in suit was situated. The defendant, who was a co-sharer in that patti, had claimed to take the share sold, under the provisions of s. 14, Act XXIII of 1861. The officer conducting the sale had allowed the defendant's claim, and the Court executing the decree had confirmed the sale in his favour.

[273] The Court of first instance held that the plaintiff was a "stranger" within the meaning of s. 14, Act XXIII of 1861, and that the defendant was therefore entitled to take the share, and dismissed the suit. The lower appellate Court held that the plaintiff was not a "stranger" within the meaning of that section and gave him a decree.

On special appeal by the defendant to the High Court it was contended that the suit was not maintainable, and that the lower appellate Court had placed a wrong construction on the provisions of s. 14, Act XXIII of 1861.

Munshi *Hanuman Parshad* for the Appellant.

Pandit *Bishambar Nath*, Lala *Lalta Parshad* and Shah *Asad Ali* for the Respondent.

The following Judgments were delivered by the Court:—

Stuart, C. J.—The judgment of the Judge is substantially right. This is really not a case where the defendant shows any exclusive right of pre-emption and where the plaintiff is a "stranger," but of competitive pre-emption, if I may be allowed the expression, the plaintiff's claim in respect of title being quite as good as that of the defendant, while he has priority by purchase. As pointed out by the Judge, although the plaintiff did not live in the same patti as the vendor, but in another patti, he was a member of the co-parcenary, and therefore his claim under s. 14 of Act XXIII of 1861 must be allowed, and the sale to the defendant declared invalid. But the plaintiff cannot benefit by this judgment, and obtain possession, until the sale to him has been confirmed. I am therefore of opinion that, with this slight modification, the appeal should be dismissed, and with costs, the plaintiff, respondent, having substantially succeeded, and defendant treating him as a stranger and denying his right as a member of the co-parcenary.

Oldfield, J.—The plaintiff is himself a member of the co-parcenary, being a sharer in another patti of the estate. The right of pre-emption can only be asserted against a stranger, i.e., one who is not a co-sharer or member of the co-parcenary. A sharer in one of the pattis in a pattidari estate cannot be said to be a stranger with reference to the co-sharers in another patti, and the section gives no preferential rights of pre-emption among themselves between co-sharers in the same patti and sharers in other [274] pattis, who come under the denomination of members of the co-parcenary. But the plaintiff can, however, only obtain a declaration that the defendant has no right of pre-emption as against him, and that the sale to the defendant is invalid, but he cannot obtain possession until the sale has been confirmed in his

favour and made absolute. He has taken no steps to effect this by moving the Court which ordered the sale to confirm it in his favour, which is the proper remedy open to him. I would modify the decree of the lower appellate Court by declaring that the defendant has no right of pre-emption as against plaintiff, and that the sale to the defendant is invalid.

[1 All. 275]

APPELLATE CIVIL.

The 11th August, 1876.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR. JUSTICE TURNER.

Darshan Sing and others.....Defendants

versus

Hanwanta.....Plaintiff.*

Act VIII of 1871 (Registration Act), s. 17, cl. (2)—Registration—Mortgage.

A bond which charged immoveable property with the payment on a day specified therein of Rs. 99, the principal amount, and Rs. 6, interest thereon, should have been registered under the provisions of cl. (2), s. 17, Act VIII of 1871.†

THE plaintiff in this suit claimed to recover the amount of a bond, dated the 21st March 1871, from the defendants personally and by the sale of their property, situated in mauza Gutla, which he alleged was charged in the bond with the payment of the amount. The defendants described in the bond, which was unregistered, as residents of mauza Gutla, bound themselves to pay the plaintiff, described as a resident of the same mauza, on the 5th June 1871, the sum of Rs. 99, together with interest thereon at 2 per cent. per mensem, and with such payment they charged "their house and landed property." The suit was instituted on the 15th September 1875.

The Court of first instance held that the plaintiff's claim against the defendants personally was barred by limitation, and that his claim against their property situated in mauza Gutla was not [275] maintainable, as the bond created no charge thereon. The lower appellate Court held that the bond created a charge on that property, referring to *Martin v. Pursram* (H. C. R., N.-W. P., 1867, p. 124).

On special appeal by the defendants to the High Court it was contended that the bond created no charge upon immoveable property, the case cited by the lower appellate Court being inapplicable, and that the claim against them personally was barred by limitation.

* Special Appeal, No. 674 of 1876, from a decree of the Judge of Agra, dated the 18th March 1876, reversing a decree of the Munsif, dated the 27th November 1875.

†(So held in *Dhurmdeo Narain Singh v. Nund Lall Singh*, H. C. R., N.-W. P., 1874 p. 257, with reference to the corresponding provisions of s. 17, Act XX of 1866.)

The Senior Government Pleader (*Lala Juala Parshad*) and Munshi *Kashi Parshad* for the Appellants.

The Junior Government Pleader (*Babu Dwarka Nath Banarji*) for the Respondent.

The following Judgment was delivered by the Court :—

Assuming that the instrument creates a charge on immoveable property, which may be doubted (see next case) it purports to create an interest over Rs. 100 in value, for it secured the repayment of Rs. 99 plus Rs. 6, the interest for three months. This was the least sum that could have been recovered under the instrument. The instrument not having been registered we cannot act upon it. Nor can we decree the debt apart from the lien, for the agreement should have been but was not registered, and more than four years had elapsed prior to suit from the date on which the agreement to repay the money was broken. This claim was therefore barred by limitation. The appeal is decreed, and, the decree of the lower appellate Court being reversed, the decree of the Court of first instance is restored with costs.

NOTES.

[See the notes to 5 Mad. 214 in the Law Reports Reprints.]

[1 All. 275]

APPELLATE CIVIL.

The 11th August, 1876.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR JUSTICE TURNER

Deojit.....Plaintiff

versus

Pitambar and others.....Defendants.*

Mortgage—Uncertain agreement—Ambiguous or defective document—Act IX of 1872 (Contract Act), s. 29—Act I of 1872 (Evidence Act), s. 93.

Semble, that where certain persons, describing themselves as residents of J, give a bond for the payment of money in which, as collateral security, [275] they charge "their property" with such payment, they do not thereby create a charge on their immoveable property situated in J.

Martin v. Purseram (H. C. R., N.-W. P., 1867, p. 124) distinguished.

THE plaintiff in this suit claimed to recover certain money which he alleged was charged upon the immoveable property of the defendants situated in mauza Jarao Bas Mohan by a certain bond. This bond purported to be

* Special Appeal, No. 675 of 1876, against a decree of the Judge of Agra dated the 28th March 1876, affirming a decree of the Munsif of Jalesar, dated the 4th January 1876.

executed by the defendants, described therein as residents of Jarao Bas Mohan, in favour of the plaintiff, described as resident of Jarao Bas Kesri. The portion of the bond on which the plaintiff relied as creating a charge was as follows:— “and we hypothecate as security for the amount our property with all the rights and interests.” *

The Court of first instance and the lower appellate Court concurred in holding that the plaintiff had failed to prove the bond. The lower appellate Court further held that the hypothecation in the bond was of too general a nature to admit of a decree being given against any particular property of the defendants.

On special appeal by the plaintiff to the High Court it was contended that the bond created a charge in his favour on the property of the defendants situated in Jarao Bas Mohan.

Munshi *Hanuman Parshad* for the Appellant.

The Senior Government Pleader (*Lala Juvala Parshad*) and *Lala Lalta Parshad* for the Respondents.

The following Judgment was delivered by the Court:—

This case differs widely from the one to which reference has been made (*Martin v. Pursram*, H. C. R., N.-W. P., 1867, p. 124). If the debtors had described themselves as the owners of certain property and then gone on to pledge their rights and interests, it would have been reasonable to refer the indefinite expression to the description. In this case the debtors simply describe themselves as residents in a place and pledge “*kul haq haquk*.” This case falls within the principle of the decision (see e.g., *Ram Baksh v. Sookh Deo*, H. C. R., N.-W. P., 1869, p. 65) that a general hypothecation is too indefinite to be acted upon. Under [277] the Contract Act, s. 29, an agreement is void if its meaning is not certain or capable of being made certain, and under s. 93 of the Evidence Act, where the language of a deed is, on its face, ambiguous or defective, no evidence can be given to make it certain. The Courts below have, however, found that the deed was not proved, and by this finding we are bound. Our observations on the other issue are intended to impress upon money-lenders that distinctness in the description of property mortgaged is essential. The appeal fails and is dismissed with costs.

NOTES.

[Where the property *can* be ascertained, there is no uncertainty. —(1890) 12 All. 175 (1882) 5 All. 11, (1881) 3 Mad. 35.]

* The original words are “*hakiyat apne kul haq haquk*.”

[1 All. 277]

APPELLATE CIVIL.

The 16th August, 1876

MR. JUSTICE SPANKIE AND MR. JUSTICE OLDFIELD.

Narain Singh.....Defendant

versus

Muhammad Faruk.....Plaintiff.*

Act XXIII of 1861, s. 14—Pattidari Estate—Pre-emption—Act XVIII of 1873, s. 177—Act XIX of 1873, s. 188.

The provisions of s. 14, Act XXIII of 1861, are not applicable, where the land is sold in execution of a decree of a Revenue Court.

Held, on the assumption that, where land is sold in execution of such a decree, a claim to the right of pre-emption can be preferred under the provisions of s. 177 of Act XVIII of 1873, and s. 188 Act XIX of 1873, that such claim can only be preferred where the land is a patti of a mahal, not where it is part only of a patti of a mahal.

Sembler that, where land which is a patti of a mahal is sold in execution of such a decree, a claim to the right of pre-emption can be preferred under the provisions of s. 177, Act XVIII of 1873, and s. 188, Act XIX of 1873.

THIS was a suit to establish the plaintiff's right to certain land forming portion of a patti of a pattidari mahal. The suit was based upon the provisions of s. 14, Act XXIII of 1861. The land was sold to the defendant on the 20th August 1874, in execution of decree of a Revenue Court made in a suit under cl. 2, s. 1, Act XIV of 1863. The plaintiff preferred a claim to take the land at the price it was knocked down to the defendant [278] under the provisions of s. 14, Act XXIII of 1861, but his claim was disallowed. The Court of first instance held that the suit was not maintainable, being of opinion that s. 14, Act XXIII of 1861, applied only to sales in execution of decrees made by Civil Courts, and that Act XVIII of 1873 did not provide for the preferring of pre-emptive rights on the occasion of sales in execution of decrees made by the Revenue Courts under that Act. The lower appellate Court held that the suit was maintainable, having regard to s. 177, Act XVIII of 1873, and s. 188, Act XIX of 1873.

Against this decision the defendant appealed to the High Court.

Pandit Bishambar Nath and Pandit Ajudhia Nath for the Appellant.

Mr. Mahmood, Munshi Hanuman Prashad, and Shah Assad Ali for the Respondent.

The Judgment of the Court, so far as it is material for the purposes of this report, was as follows :—

The suit was instituted under s. 14, Act XXIII of 1861, but that section cannot apply to sales in execution of decrees by Revenue Officers. The Act is

* Special Appeal, No. 666 of 1876, from a decree of the Judge of Azamgarh, dated the 16th March 1876, reversing a decree of the Munsif of Nagra, dated the 6th December 1875.

supplementary to and amends Act VIII of 1859, which is purely a Code of Civil Procedure. The Rent Act X of 1859 provided for the execution of decrees under the Act by Courts presided over by Revenue officers, and Act XIV of 1863, under which the suit was brought and decreed, and the property now in suit was sold in execution on the 20th August 1874, is by s. 18 declared to be a part of Act X of 1859. Hence it is quite clear that s. 14, Act XXIII of 1861, would not apply to the present suit, and no claim to pre-emption would be asserted under it. Since the decree under Act XIV of 1863, Act X of 1859 has been repealed, and if the present Rent Act admits of the assertion of a pre-emptive title in cases of sale in execution of decrees, the suit should have been founded on some section in that Act. The Munsif possibly might have thrown out the suit as based on s. 14, Act XXIII of 1861, which did not apply; but the plaint distinctly stated that the sale took place in the execution of a decree of a Revenue Court, and the Munsif made it an issue whether the plaintiff had any right of pre-emption in such a case. In making this issue we think that the [279] first Court was right, as the nature of the claim was apparent, and the defendant would not be prejudiced on the merits of the case, if it would be successfully urged; and on the other hand if the Rent Act provided no means of asserting a pre-emptive title in sales in execution of decrees the defendant had a complete answer to the suit. The lower appellate Court's judgment opens with the remark that the plaintiff brought his suit under the Muhammadan law in respect of pre-emption. But this is not so; no such claim was asserted. The suit rests upon some assumed right as a co-sharer to claim at a sale in execution of a decree by a Revenue Court to purchase the property sold at the price it was knocked down to the last bidder, and the plaintiff asserts that he made the claim at the time of sale, and fulfilled all the conditions of the sale, but his claim was disallowed. It was contended that s. 177, Act XVIII of 1873, and s. 188, Act XIX of 1873, applied to the case. S. 177 of the former Act gives power to the Board of Revenue to order the sale of immoveable property under certain conditions, and if the property be sold, the sale shall be made under the rules in force for the sale of land for arrears of land revenue. The only reference to pre-emption in Act XIX of 1873 is to be found in s. 188. It is contended that, as the sale is concluded before the claim to pre-emption can be made, the claim itself is not made under any rules for the conduct of sales. We should, however, be disposed to disallow this contention. It is not, however, necessary on the present occasion to determine the point. S. 188 provides that, when any land sold under s. 166 is a patti of a mahal, any recorded co-sharer, not being himself in arrear with regard to such land, may, if the lot has been knocked down to a stranger, claim to take the said land at the sum last bid. From this section, and s. 166, it is clear that the land must be a patti of a mahal and not a portion of a patti; and this contention of the appellant's pleaders appears to us to dispose of the suit in which the land claimed is only a portion of a patti. We, therefore, think that this suit founded on the alleged right to claim as a pre-emptor in a sale in execution of a decree of a Revenue Court, under rules for the conduct of such sales, fails, and was properly dismissed by the first Court. We, therefore, decree the appeal, and reverse the decision of the lower appellate Court, restoring the decree of the Munsif with costs.

[280] APPELLATE CIVIL.

The 21st August, 1876.

PRESENT :

MR. JUSTICE TURNER AND MR. JUSTICE SPANKIE.

Meghraj.....Plaintiff

versus

Zakir Hussain.....Defendant.*

Act XVIII of 1850, s. 1—Jurisdiction—Good faith.

Under the provisions of s. 1,† Act XVIII of 1850, no person acting judicially is liable for an act done or ordered to be done by him in the discharge of his judicial duty within the limits of his jurisdiction. In such a case the question whether he acted in good faith does not arise.‡

THIS was a suit in which the plaintiff claimed to recover damages from the Munsif of Meerut on the ground that he had acted contrary to law, and had postponed the sale in execution of a decree held by the plaintiff. The cause of action was stated in the plaint to have arisen on the 2nd August. In his written statement the plaintiff made allegations imputing that the defendant had not acted in good faith.

The Court of first instance dismissed the suit on the ground that the plaint disclosed no cause of action.

The plaintiff appealed to the High Court, contending that the Court of first instance should have tried and determined the question whether the defendant had acted in good faith.

Mr. Howard and Babu Jogendra Nath for the Appellant.

Mr. Mahmood, Mr. Conlan, Pandit Bishambar Nath, and Munshi Hanuman Pershad for the Respondent.

The Judgment of the Court was as follows:—

The appellant obtained a decree in the Small Cause Court of Meerut for a sum of Rs. 61. The judgment-debtor having no [281] moveable property, the appellant obtained a certificate from the Small Cause Court and

* Regular Appeal, No. 34 of 1876, against a decree of the Judge of Meerut, dated the 10th April 1876.

† Sec. 1 :—No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court, for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction : provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of ; and no Officer of any Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same.]

{See *The Collector of Hooghly v. Tarak Nath Mukhopadhyay*, 7 B. L. R., 449 ; S. C. 16 W. R., 63 ; and *Pralhad Makarudra v. Watt*, 10 Bom. H. C. R., 346 ; in which cases, however, the protection to a judicial officer acting within his jurisdiction was rested not on Act XVIII of 1850, but on general principles of law.}

applied to the Munsif to execute the decree by attachment and sale of the judgment-debtor's rights and interests in a house. Orders were accordingly issued, but with the consent of the appellant or his pleader the sale was from time to time postponed. Eventually it was ordered the sale should take place on the 3rd August; but on the 2nd August the judgment-debtor again applied for a postponement, stating that negotiations were in progress for the sale of the house by private sale. The Munsif inquired of the decree-holder's pleader if it was probable the money to satisfy the decree would be raised, and on the pleader's stating that he thought it was probable, and apparently offering no opposition to the postponement, the sale was again put off to the 16th September. On that day the judgment-debtor brought into Court Rs. 50, and prayed for further delay. The decree-holder's pleader complained that the amount paid in was too small, but consented to the payment of the money, and did not press any objection to the postponement of the sale. Subsequently the sale took place, but it was set aside on the ground that it was held after the proper time of the day, and therefore no adequate price was offered for the property. These are the facts on which the appellant relies to establish his case.

Now it is enacted by Act XVIII of 1850 that no judge or other officer therein mentioned shall be liable for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he at the time in good faith believed himself to have jurisdiction to do or order the thing complained of.

It is clear the munsif had jurisdiction, and therefore the question of good faith does not arise. He is protected from suit by the provisions of the Act, and although it is unnecessary to express any opinion on the point, we feel bound to say that, whether or not the Munsif was right in setting aside the sale on the ground urged before him, and whether or not he should have declined to grant the postponement of the sale on the 16th September, we have heard nothing which would support the suggestion (which was not made in the plaint) that he has not acted in good faith. We dismiss the appeal with costs.

NOTES.

[See also (1890) 12 All. 115.]

[282] APPELLATE CIVIL.

The 21st August, 1876.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND
MR. JUSTICE OLDFIELD.

Nand Kumar and others.....Defendants

versus

* Radha Kuari.....Plaintiff.*

Res judicata—*Hindu widow—Reversioner.*

On her husband's death, a Hindu widow obtained possession of his estate as his heir, and, in a suit against her for possession thereof by certain persons claiming to succeed to the estate

* Regular Appeal, No. 26 of 1876, against a decree of the Subordinate Judge of Gorakhpur, dated the 1st February 1875.

as rightful heirs, a decree was obtained by them. Held that such decree was a bar to a new suit against those persons by the daughter claiming the estate in succession to the widow, the decree having been fairly and properly obtained against the widow.*

THIS was a suit in which the plaintiff claimed possession of certain shares in certain villages as heir, in succession to her mother, to the estate of her deceased father, Lachmi Narain, under Hindu Law. The plaintiff's father died leaving a widow named Ananda, the plaintiff's mother, who at his death obtained possession of his estate as his heir. The defendants in this suit sued her, as the rightful heirs of Lachmi Narain, for possession thereof. She pleaded that the property was the separate and self-acquired property of her husband, and that she was therefore entitled to succeed to it. It was held proved in that suit that the property was the joint and undivided property of the defendants in this suit and Lachmi Narain, and the defendants in this suit obtained a decree establishing their right and title to the property.

In the present suit the plaintiff averred that the property was the separate property of Lachmi Narain, and the decree in the former suit was obtained by collusion and fraud on the part of her mother and the defendants. The defendants urged that the decree in the former suit against her mother was a bar to the present suit by the plaintiff. The Court of First Instance overruled this plea, and gave the plaintiff a decree.

On appeal by the defendants to the High Court it was again contended that the plaintiff was bound by the decree in the former suit.

Lala *Lalta Parshad* for the Appellants.

[283] The Senior Government Pleader (*Lala Juala Parshad*) and Munshi *Sukh Ram* for the Respondent.

The Judgment of the Court, so far as it related to the above contention, was as follows :—

We are of opinion that the objection is a valid one and disposes of the plaintiff's claim. A Hindu widow succeeding to her husband's estate as heir represents the estate fully, and reversioners claiming to succeed after her are bound by decrees relating to her husband's estate obtained against her without fraud or collusion—*Kutama Natchiar v. The Raja of Shiva gunga* (9 Moore's Ind. App., 604); *Ganga Jali v. Ram Sukal* (S. A., No. 355 of 1875, decided the 26th August 1875); *Bansi Kuari v. Sunjhari Kuari* (R. A., No. 16 of 1875, decided the 19th August 1875); *Suga Kumari v. Ramugrah Dubay* (R. A., No. 72 of 1875, decided the 21st April 1876); *Nobin Chunder Chuckerbutty v. Guru Persad Doss* (B. L. R., Sup. Vol., 1008; S. C., 9 W. R., 505); *Amirtolal Bose v. Rajoneekant Mitter* (15 B. L. R., 10).

There is no reason to believe that the decree against Musammat Ananda was obtained by collusion or fraud, and we must therefore consider that it has finally disposed of the plaintiff's claim. We allow the appeal and dismiss the suit with costs.

NOTES.

[As to when the Hindu widow represents the husband's estate so as to give room for *res judicata*, see also 11 I. A. 207; 8 All. 365; 429; 8 Mad. 341; (1888) P. R. 189; (1906) P. R. 107.]

*Adverse possession against a Hindu female heir, which would bar her right of suit if she were alive, will equally bar that of the reversioner—*Nobin Chunder Chuckerbutty v. Guru Persad Doss*, B. L. R., Sup. Vol. 1008; S. C., 9 W. R., 505.

[1 All. 283].

APPELLATE CIVIL.

The 22nd August, 1876.

PRESENT:

SIR ROBERT STUART, Kt., CHIEF JUSTICE, AND MR. JUSTICE SPANKIE.

Ali Muhammad.....Defendant

versus

Taj Muhammad.....Plaintiff.*

Muhammadan Law—Pre-emption—Act VI of 1871, s. 24

The right of pre-emption being a right, weak in its nature, where such right is claimed under Muhammadan law, it should not be enforced except upon strict compliance with all the formalities which are prescribed by that law.†

[284] Under Muhammadan law the “*talab-i-mawasabat*,” or immediate claim to the right of pre-emption, should be made as soon as the fact of the sale is known to the claimant, otherwise the right is lost, and it was consequently held that the plaintiff, having failed to make the “*talab-i-mawasabat*” until twelve hours after the fact of the sale became known to him, had lost his right of pre-emption.‡

THIS was a suit for pre-emption founded on Muhammadan law, the parties to the suit being Muhammadans. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

* Special Appeal, No. 661 of 1876, against a decree of the Judge of Allahabad, dated the 5th April 1876, reversing a decree of the Munsif, dated the 8th September 1875.

† See the following cases:—*Kareemooddeen v. Moizudddeen Khan*, H. C. R., N.-W. P., 1866, p. 184; *Gholam Hossein v. Abdool Kadir*, H. C. R., N.-W. P., 1873, p. 11; *Bhowanee Dutt v. Lakshoo Singh*, W. R., 1864, p. 61; *Hosseinee Khanum v. Lallun*, W. R., 1864, p. 117; *Issur Chunder Shaha v. Mirza Nisar Hossein*, W. R., 1864, p. 351; *Mona Singh v. Mosrad Singh*, 5 W. R., 203; *Razeenodddeen v. Zeenul Bibee*, 8 W. R., 463; *Jhotee Singh v. Komul Roy*, 10 W. R., 119; *Narbhave Singh v. Luchmee Narain*, 11 W. R., 307; *Prokas Singh v. Jorgeswar Singh*, 2 B. L. R., A. C., 12; *Jadu Singh v. Rajkumar*, 4 B. L. R., A. C., 171; S. C., 13 W. R., 177; *Chamroo Pasban v. Puhluwan Roy*, 16 W. R., 3; *Nabeee Buksh v. Kaloo Lushker*, 22 W. R., 4; *Elahee Buksh v. Bibee Mohan*, 25 W. R., 9.

‡ In *Karimooddeen v. Moizudddeen Khan*, H. C. R., N.-W. P., 1866, p. 184, it was held that the performance of the “*talab-i-mawasabat*” before the registrar, on the registration of the sale-deed, was not a sufficient compliance with Muhammadan law. In *Ram Charan v. Narbhir Mahton*, 4 B.L.R., A.C., 216; S.C., 13 W.R., 259, it was held, where the pre-emptor, on hearing of the sale, went to the property in dispute and performed that formality, that the delay was fatal. Where the pre-emptor went into his house to get the money before performing that formality, it was held that he had not complied with the law.—*Mona Singh v. Mosrad Singh*, 5 W. R., 203. Where the pre-emptor was sitting when he heard of the sale, and stood up and performed the formality, it was held that there was no delay sufficient to work a forfeiture of his right,—*Maharaj Singh v. Buchhook Lall*, W. R., 1864, p. 294, approved of in *Ram Charan v. Narbhir Mahton*, supra. In *Amjad Hossein v. Kharag Sen Sahu*, 4 B. L. R., A. C., 203; S. C., 18 W. R., 299, it was held that the mere fact of the pre-emptor taking a short time before the performance for ascertaining whether the information conveyed to him was correct or not, did not invalidate his right, and that the law allows a short time for reflection.

Maulvi Obeidulrahman and Maulvi Mehdi Hassan for the Appellant.

Pandit Ajudhia Nath and Munshi Ram Parshad for the Respondent.

The Judgment of the Court was as follows:—

The “*talab-i-mawasabat*,” or immediate demand, should be made when a person entitled to pre-emption has heard of a sale, on the instant, whether there is any one by him or not, and when he remains silent without claiming the right it is lost,—Baillie's Digest of Muhammadan law, Bk. vii, ch. iii. The “*talab-i-ishhad*,” or demand with invocation of witnesses, is a calling on witnesses to attest the immediate demand and must take place in the presence of the purchaser or seller or of the premises which are the subject of sale,—Baillie's Digest of Muhammadan Law, Bk. vii, ch. iii.

The Munsif dismissed the claim because it was obvious from the examination of the plaintiff that he did not, on hearing of the sale, immediately, on the instant, claim his right of pre-emption. He heard of the sale in the morning but did not assert his right [285] until 7-30 or 8 in the evening. The plaintiff appealed and contended that the delay in making affirmation of his demand did not destroy his right of pre-emption.

The Judge, citing a decision of the Calcutta High Court noted in the margin and based upon a decision of the Sudder Dewanny Adawlut in 1857, held that the delay in this case was not such that it interfered with the plaintiff's right of pre-emption. He therefore remanded the case under s. 351 for re-trial on the merits.

It is contended here by the special appellant that the delay was fatal. Moreover, the plaintiff had opportunities of asserting his right on the premises and before some labourers at work on the roof, and he neglected to do so, and so lost his right.

It is to be observed that the Munsif laid down as an issue whether or not the plaintiff had fulfilled the conditions of immediate demand, and demand with invocation of witnesses, and his judgment would seem to imply that he did not fulfil the condition of immediate demand, as he heard of the sale in the morning and did not assert his right until 7-30 or 8 P.M. in the evening. On the other hand, the Judge seems to have lost sight of this finding, and to have addressed himself solely to the plea that the affirmation of purchase (before witnesses) in the evening was not such a delay as to vitiate the right of pre-emption. This clearly appears from his citing a judgment in which the question was whether the demand by invocation of witnesses had been made too late.

In special appeal the contention appears to be that neither of the conditions of immediate demand, nor demand with invocation of witnesses, has been made. At the same time the third plea seems to confuse both conditions, for it is not necessary that the immediate demand should be made on the premises, though it ought to have been made before the labourers. As the Munsif only received the evidence of one person, who was the plaintiff himself, for it does not appear that any evidence was offered by the defendant, and as the two judgments seem to relate to different demands, we think that we ought to consider what it was that the plaintiff really said, and what was the effect of his admissions.

[286] The plaintiff at the outset of his examination stated that he heard of the sale for the first time on the 16th June in the evening at 5 P.M., when

he returned from Court, and saw several men repairing the house in dispute. He asked them on whose part they were making repairs, and they said on the part of Ali Muhammad. "I sent my brother," the plaintiff continued, "in search of Ali Muhammad to his house, but he was not found; at 7-30 or 8 o'clock Ali Muhammad came to my house." But in the after part of his deposition the plaintiff very distinctly stated that he heard at 7-30 A. M. from the labourers that "they were repairing the house on the part of Ali Muhammad, who had purchased the house; after hearing this, I did not say a single word more to the labourers, but I at once sent my brother to Ali Muhammad to call him. I went to Court * * * * * I told my brother only this much, go and call Ali Muhammad, I did not tell him anything more. I made mention about pre-emption for the first time at 7-30 in the evening when Ali Muhammad came."

This evidence justifies the decision at which the Munsif arrived, inasmuch as it shows that the plaintiff did not make the immediate demand on the instant when he first heard of the sale. He should have done so before the labourers. He said that two minutes after leaving the labourers he sent his brother to call Ali Muhammad, but he admits that he did not even before his brother claim the right. Although the plaintiff's intention doubtless was to make the demand to Ali Muhammad had he been found and had come to him in the morning, still the delay in making the immediate demand is such that cannot be remedied. The meaning of the word "*mawasabat*" is literally jumping up (Baillie's Digest, Bk. vii, ch. iii), and though it has been said that the demand may be made at any time during the meeting at which the information has been received, still even if this were so, in this case it is clear that no demand was made until twelve hours after the plaintiff became aware of the sale, and then it was made at the same time with the demand with invocation of witnesses.

We are not called upon to say whether the Judge has rightly ruled (if he has so ruled) that the delay in making the demand with invocation of witnesses was not too late. The making of this [287] demand is measured by the ability to do so, and the Judge considers apparently that it was made with the least practicable delay. But if the Judge is to be understood as applying this test to the immediate demand, then we think that he is wrong, and that delay in making the immediate demand is fatal, because it must be made at once when the fact of the sale becomes known.

The Full Bench decision of this Court cited marginally ruled that, under s. 24, Act VI of 1871, Muhammadan law is not strictly applicable in suits for pre-emption between Muhammadans not based on local custom or contract, but it is equitable in such cases to apply that law. So in cases relating to gifts it was held in another Full Bench decision (*Shumshoolnissa v. Zohra Beebee*, H. C. R., N.-W. P., 1874, p. 2), that it was equitable as between Muhammadans to apply Act VI of 1871 to such questions. The right of pre-emption is not a strong right, and it appears to us that any one claiming it should be held bound by the conditions of the Muhammadan law, and should promptly assert his right of pre-emption by the immediate demand. It is not surely the duty of the Courts to enlarge the conditions under which so inconvenient and sometimes oppressive a right can be asserted. Following the principle laid down in the Full Bench decisions of this Court already referred to, we

think that the judgment of the lower Appellate Court is wrong, and that of the first Court should be restored. We, therefore, decree the appeal and reserve the judgment of the lower Appellate Court, and restore that of the first Court with costs.

NOTES.

[See also (1908) 35 Cal. 575.]

[1 All. 287]

APPELLATE CIVIL.

The 22nd August, 1876.

PRESENT:

MR. JUSTICE TURNER AND MR. JUSTICE SPANKIE.

In the matter of the petition of Rukmin and another.*

Act XXVII of 1860, ss. 5, 6—Certificate for collection of debts—Security—Appeal.

No appeal impugning the order of a District Court requiring security from the person to whom it has granted a certificate, under Act XXVII of [288] 1860, lies under that Act to the High Court. *Sonea v. Ram Suha* (H. C. R., N.-W. P., 1870, p. 146) and *Monmohinee Dassee v. Khetter Gopaul Dey* (I. L. R., 1 Cal., 127; S. C., 24 W. R., 362; see also *Raj Mohinee Chowdhraian v. Dino Bundhon Chowdhry*, I. L. R., 1 Cal., 128 note; S. C., 17 W. R., 566) followed.

Semblé, that, in proceedings under Act XXVII of 1860, a review of judgment is admissible (see *Petition of Poona Kooer*, I. L. R., 1 Cal. 101; but see also *Sivu v. Chenamma*, 5 Mad. H. C. R., 417).

THIS was an application to the District Court for a certificate under Act XXVII of 1860. It was made on the ground that the applicants were the widows and sole heirs of the deceased. The debts due to the estate of the deceased were stated in the application to amount to Rs. 3,000. Notice was issued in accordance with the provisions of s. 6 of the Act, but no claimants appeared. The District Court granted the certificate, but required the applicants to furnish security under the provisions of s. 5 to the amount of Rs. 3,000.

The applicants appealed to the High Court against the District Court's order requiring security, urging that that order was unreasonable and unjust, inasmuch as they had no separate property of their own, and there were no debts due by the estate.

Mr. Leach for the Appellants.

The Judgment of the Court was as follows :—

We must follow the ruling of this Court in *Sonea v. Ram Suha* (H. C. R., N.-W. P., 1870, p. 146), which is in accordance with a recent ruling of the Calcutta High Court in *Monmohinee Dassee v. Khetter Gopaul Dey* (I. L. R.,

* Miscellaneous Regular Appeal, No. 42 of 1876, from an order of the Judge of Cawnpore, dated the 19th May 1876.

1 Cal., 127; s. c., 24 W. R., 362; see also *Raj Mohinee Chowdhryain v. Dino Bundhoo Chowdhry*, I. L. R., 1 Cal., 128, note; s. c., 17 W. R., 566). The appeal then fails; but if the facts are such as the petitioners assert, we consider that the appellants should apply to the Judge to reconsider the order relating to security, and that the Judge might well comply with their prayer and reduce the amount demanded.

NOTES.

[See also (1880) 9 All. 304.]

[1 All. 288]

APPELLATE CIVIL.

The 22nd August, 1876.

PRESENT:

SIR ROBERT STUART, K.T., CHIEF JUSTICE, AND MR. JUSTICE OLDFIELD.

Hassan Ali.....Defendant

versus

Naga Mal.....Plaintiff.*

Adoption—Hindu Law—Jain Law.

The question of the validity of an adoption, the parties between whom the [289] question arose being Jains, was decided in accordance with the law of that sect, and not in accordance with Hindu law. *Sheo Singh Rai v. Dakho* (H. C. R., N.-W. P., 1874, p. 382), followed.

Under Jain law the adoption of a sister's son is valid.

THIS was a suit in which the plaintiff claimed to be maintained in possession of a moiety of certain buildings, by partition. He sued as the adopted son of one Chunna Singh deceased. The parties to the suit were Saraojis. The defendants pleaded that the adoption of the plaintiff by Chunna Singh was invalid under Hindu law, the plaintiff being the only son of his natural father and son of Chunna Singh's sister. Both the lower Courts found that, by the custom of the sect to which the parties belonged, the adoption was valid, and held that such custom was applicable and not Hindu law.

On special appeal by one of the defendants to the High Court it was contended that the validity of the plaintiff's adoption should be decided under Hindu law.

The Senior Government Pleader (Lala Juala Parshad) and Munshi Hanuman Parshad for the Appellant.

Pandit Bishambhar Nath for the Respondent.

The Judgment of the Court, so far as it related to the above contention, was as follows:—

The plaintiff is the adopted son of one Chunna, and is at the same time Chunna's sister's son, and the material question raised in special appeal is

* Special Appeal, No. 1085 of 1874, against a decree of the Judge of Saharanpur, dated the 21st May 1874, affirming a decree of the Munsif of Muza�arnagar, dated the 25th March 1874.

whether, under the Jain law (the parties being Saraogis), an adoption of a sister's son is valid. Evidence on the point was given in the Court of First Instance, and the lower Appellate Court gave the parties opportunity of producing further evidence, which was produced, and which supports the view taken by both the lower Courts, that such an adoption is valid under Jain law. We find no reason to doubt the correctness of this decision, and find that it is quite consistent with a ruling of this Court,—*Sheo Singh Rai v. Dakho* (H. C. R., N.-W. P., 1894, p. 392), where all the authorities have been reviewed. In that case it was held that, in questions arising between parties of the Jain sect, the custom of the sect should be inquired into and given effect to, although it may be at variance with Hindu law, and it was further held that, among followers of the Jain sect, a daughter's son might be adopted. In the case before us the adoption is of a sister's son, but the principle involved in both cases is [290] the same, and, indeed, looking to the grounds upon which the objection to such adoption is based under the Hindu law, it would have more force in the case of the adoption of a daughter's son than of a sister's son.

NOTES.

[See also 3 Bom. 273.]

[1 All. 290]

APPELLATE CIVIL.

The 26th August, 1876.

PRESENT :

SIR ROBERT STUART, Kt., CHIEF JUSTICE, AND MR. JUSTICE OLDFIELD.

Jvn Muhammad.....Defendant

versus

Ilahi Baksh.....Plaintiff.*

Act VIII of 1859, s. 260—Certified purchaser.

The certified purchaser of certain property at a sale in execution of decree sued to establish his right to the property and for possession thereof.

Held that the defendant in the suit was not precluded by s. 260, Act VIII of 1859, from resisting the suit on the ground that he was the actual purchaser of the property.

THIS was a suit to establish the plaintiff's right to a moiety of a house and garden, and for possession, by partition, of the same, the plaintiff claiming as certified purchaser of the property at a sale in execution of decree. The defendant urged that he was the actual purchaser of the property, relying on a petition presented by the plaintiff to the Court executing the decree in which he had stated that the defendant was the actual purchaser and had paid the purchase-money, and that he had made the purchase on behalf of the defendant, to whom he prayed the sale-certificate might be granted. The Court executing the decree refused the application and granted the certificate to the plaintiff. He further urged that the property belonged to him before the date of the sale

* Special Appeal, No. 1138 of 1875, from a decree of the Subordinate Judge of Moradabad, dated the 20th July 1875, affirming a decree of the Munsif of Nagina, dated the 16th January 1875.

and was not the subject of the sale. The Court of First Instance gave the plaintiff a decree. The lower Appellate Court found that the property belonged to the judgment-debtor and was the subject of the sale, and held that the defendant was precluded by s. 260, Act VIII of 1859, from raising the plea that he was the actual purchaser.

On special appeal to the High Court by the defendant it was contended that s. 260, Act VIII of 1859, did not apply, and the question who was the actual purchaser should have been tried and determined by the lower Appellate Court on the merits.

[291] Munshi Hanuman Parshad and Munshi Kashi Parshad for the Appellant.

The Senior Government Pleader (Lala Juala Parshad) for the Respondent.

The Judgment of the Court (after stating the facts of the case) was as follows :—

In our opinion the Court has taken an erroneous view of the law. All that s. 260 declares is that "any suit brought against the certified purchaser on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agreement the name of the certified purchaser was used shall be dismissed." The law will not, therefore, in strictness apply to this case, where it is the certified purchaser who is suing to enforce his alleged purchase, and where the objection is taken by the defendant who is in possession. The section should be construed literally and applied strictly. The Court will not apply s. 260 so as to assist the certified purchaser to enforce his claim against the party in possession, by relieving him from the necessity of showing the justice of his claim or excluding inquiry as to its fraudulent character. This view of the law is supported by the Privy Council rulings in *Buhuns Koonwur v. Lalla Buhoree Lall* (10 B. L. R., 159; S.C., 18 W. R., 157), and in *Lokhee Narain Roy v. Kalypuddo Bandopadhyay* (L. R., 2 Ind. App., P.C.; 154; see also *Mirza Khyrat Ali v. Mirza Syfoollah Khan*, 8 W. R. 130; and *Muthoora Nath Doss v. Rni Komul Dossee*, 24 W. R., 278). We remand the case for trial under s. 354, Act VIII of 1859, of the issue whether plaintiff or defendant was the real purchaser at auction of the property in suit.

NOTES.

[See also (1899) 8 O. C., 229.]

[1 All. 291]

APPELLATE CIVIL.

The 21st August, 1876.

PRESENT :

MR. JUSTICE TURNER AND MR. JUSTICE SPANKIE.

Mahabir Parshad and another.....Plaintiffs

versus

Debi Dial and others.....Defendants.*

Pre-emption—Conditional decree.

Where a share in a certain patti was sold by the holder of the share to a stranger, and three persons, holding equal shares in the patti, were equally entitled under the village administration-paper to the right of pre-emption of the share, [292] held that such persons were each entitled to have the sale made to him to the extent of one-third of the share.

The decree of the High Court in this suit specified a time within which each party to the suit should pay into Court a proportion of the purchase-money and declared that, if either failed to pay such proportion within time, the other of them making the further deposit within time, should be entitled to the share of the defaulter (*see* next case).

THIS was a suit to enforce a right of pre-emption. In a certain mauza, in a patti of 5 annas 4 pies, the following persons each owned an 8-pie share, *viz.*, Darsistman, Duliman, Debi Dial, and Mahabir Parshad. Debi Dial sold his share to Musafir and Jan, strangers, by a deed, dated the 15th September 1874, in which the purchase-money was entered as Rs. 551. Under a condition in the village administration-paper relating to pre-emption, Darsistman, Duliman, and Mahabir Parshad, were equally entitled, as co-sharers to the right of pre-emption. On the 22nd July 1875, Duliman sued Debi Dial, Musafir, and Jan to enforce his right. The parties to this suit filed a compromise on the 24th July, wherein it was agreed that Duliman should obtain possession of the share on payment of Rs. 551 on or before the 13th November 1875. On the 9th August 1875, Mahabir Parshad, and Darsistman instituted the present suit against Debi Dial, Musafir, Jan, and Duliman to enforce their right of pre-emption, alleging that the actual price of the property was Rs. 199. The Court of First Instance decided the two suits together, giving Duliman a decree for possession of one moiety of the property on payment of Rs. 275-8-0 on or before the 13th November 1875, and Mahabir Parshad and Darsistman a decree for possession of the other moiety on payment of Rs. 150 on or before the same date.

On appeal by Duliman the lower Appellate Court gave him a decree for possession of the whole 8-pie share on payment of Rs. 275-8-0 within thirty days from the date of the decree. The appeal preferred by Mahabir Parshad and Darsistman was dismissed. On special appeal by them to the High Court

* Special Appeal, No. 279 of 1876, against a decree of the Judge of Gorakhpur, dated the 28th December 1875, affirming a decree of the Munsif of Deoriya, dated the 8th September 1875.

it was contended, that they were entitled to a decree in proportion to their shares in the patti.

Munshi *Sukh Ram* for the Appellants.

Babu *Sital Parshad* and Babu *Jogendro Nath* for the Respondents.

[293] The Court remanded the case to the lower Appellate Court in the following terms :—

It having been found that the plaintiffs and Duliman were all co-sharers, a right of pre-emption accrued to all of them, and equitably they will be entitled each to have the sale made to him to the extent of one-third of the property sold. We have not to decide whether such a right is to be divided in proportion to the extent of the shares or in proportion to the number of persons entitled to pre-emption,* for in this case three persons assert their right to pre-emption and the shares to which the right is appurtenant are equal. We cannot, however, pass a final decree until the lower Appellate Court has determined what was the price actually paid for the share. This issue we remit under s. 354 for trial.

The lower Appellate Court found that the price actually paid for the share was Rs. 300.

The case having been returned to the High Court, Judgment was delivered as follows :—

We accept the finding on the issue remitted, and the decree will be modified accordingly. The appellants are entitled to pay into Court within one month from this decree Rs. 200 and obtain a two-third share, and Duliman will pay into Court within the same period Rs. 100 and obtain a one-third share; and if either the appellants or Duliman fail to pay in the amounts within the month, the other of them making the further deposit within the time shall be entitled to the share of the defaulter.

NOTES.

[See (1888) 10 All., 182 where this case is explained ; also (1885) 7 All., 720 ; (1884) 6 All., 370.]

* Where two persons had, by vicinage, an equal right to pre-emption, the property was equally divided between them—*Misr Khem Kurun v. Misr Seeta Ram*, H. C. R. N.-W. P., 1870, p. 257.

[1 All. 293]

APPELLATE CIVIL.

The 21st August. 1876.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR. JUSTICE OLDFIELD.

Hingan Khan and others.....Decree-holders

versus

Ganga Parshad and others.....Judgment-debtors.

Pre-emption—Conditional decree—"Final" judgment and decree—Execution of decree.

Where the plaintiff in a suit for pre-emption was granted a decree subject to the payment of the purchase-money within a fixed period, and failed to comply [294] with the condition imposed on him by the decree, held that he had lost the benefit of the same.†

When a direction contained in a decree referred to the time at which such decree should become final, held that such decree became final on being affirmed by the lower Appellate Court where, although a special appeal was preferred by the plaintiff against the decree of the lower Appellate Court, the same was subsequently allowed to be withdrawn.

Shaikh Ewas v. Mokuna Bibi (I. L. R., 1 All., 132) distinguished.

THE plaintiffs in a suit to establish the right of pre-emption of a share in a certain village, such suit being founded upon custom, obtained a decree in the Court of First Instance on the 1st April 1874, the material portion of which decree was as follows : "That the plaintiff's claim for a declaration of right to, and possession of, the property in suit be decreed, and the delivery of possession be duly effected, and if the plaintiffs deposit in this Court the whole amount of the purchase-money within one month from the date this decision becomes final, this decree will be executed, otherwise it will be held null and void." Both parties to the suit appealed against this decree. It was affirmed by the lower Appellate Court on the 19th May 1874. On the 26th August 1874, the plaintiffs preferred a special appeal to the High Court against the decree of the lower Appellate Court. On the 9th December 1874, the High Court allowed this appeal to be withdrawn, its order being as follows : "The pleader for the appellant does not support this appeal, and it is withdrawn. Costs to be paid by the appellant." On the 7th January 1875, the plaintiffs deposited in Court the amount of the purchase-money. On the 21st June 1875, they applied for possession of the property in execution of decree.

The judgment-debtors, vendees, objected to execution on the ground that the purchase-money had not been deposited within time. This objection

* Miscellaneous Special Appeal, No. 81 of 1875, against an order of the Judge of Azamgarh, dated the 4th September 1875, reversing an order of the Munsif of Muhammedabad, dated the 15th July 1875.

† So held in *Shaikh Ewas v. Mokuna Bibi*, I. L. R., 1 All., 132; *Humeed-oon-nissa v. Boksha*, S. D. A. Rep., N.-W. P., 1864, vol. ii, 619; and *Petition of Sakah Ahmed Ali*, S. D. A., L. P., Summary Cases, 36.

was disallowed by the Court of First Instance, but allowed by the lower Appellate Court.

The decree-holders appealed to the High Court on the ground that the right of pre-emption decreed in their favour was not lost by reason of their failing to deposit the purchase-money within [295] time, and that the decree did not become final till the date of the order of the High Court.

Mr. Mahmood (with him Babu Sital Parshad) for the Appellants.

Munshi Hanuman Purshad for the Respondent.

The Judgment of the Court (after setting out the facts of the case) was as follows :—

The first plea fails. No absolute right of pre-emption was established by the decree ; the decree made the right conditional on payment of the purchase-money within a certain period. Failing fulfilment of this condition, the right under the decree became null and void and the decree incapable of execution. Whether or not such a conditional decree could be legally made (and the counsel for the appellant denies that it can) is not a question for us to consider in execution of the decree : if there is force in the objection it is one which applies to the decree, and should have been taken by review of judgment.

The next objection raises the question as to when the judgment of the Court of First Instance is to be held as having become final. It is alleged by the appellant that it ought to be held as becoming final on the 9th December 1874, when this Court gave its order allowing the appellant to withdraw the special appeal. We are, however, of opinion that, under the circumstances of this particular case, the judgment became final on the 19th May 1874 when the Judge affirmed the decree of the Court of First Instance. What took place in the special appeal did not and could not affect the finality of the Judge's decree. There was no decision after a hearing but only a withdrawal, by which course the plaintiff showed the judgment to be not open to revision. So far as affecting the finality of the judgment of the Judge in regular appeal, we must look on the proceedings in special appeal as though non-existent, and in consequence hold that the judgment of the Court of First Instance became final when affirmed by the Judge in regular appeal, and that therefore the order of the lower Appellate Court should be affirmed, and this appeal should be dismissed, and we dismiss it with costs.

[296] Our attention has been drawn to a case decided by a Bench of this Court (*Shaikh Ewaz v. Mokunu Bibi*, I. L. R., 1 All., 132), where a somewhat similar question was before the Court, but there is this distinction between the two cases, that in the one referred to the special appeal had been decided after trial, whereas in the case before us the appeal was withdrawn without trial.

Stuart, C.J.—I have signed this judgment because I think that, under the circumstances of this case, it is right. But I wish to add that I am not to be understood as approving the practice of inserting conditions into decrees as to the time of payment or otherwise, notwithstanding the rulings of this Court to the contrary referred to.

NOTES.

[See (1908) 80 All., 885=5 A. L. J., 580=(1908) A. W. N., 161; (1890) 15 Bom., 370; (1889) 16 Cal., 598; (1908) P. R., 54.]

[1 All. 296]

CIVIL JURISDICTION.

The 23rd August, 1876.

PRESENT :

SIR ROBERT STUART, K.T., CHIEF JUSTICE, AND MR. JUSTICE TURNER.

In the matter of the petition of Mathra Parshad.*

Stat. 24 and 25, Vic., c. 104 (High Court's Act), s. 15—Powers of superintendence of High Court—Act VIII of 1859, s. 378—Review of judgment.

Where a Court subordinate to the High Court rejected an application for a review of judgment, refusing to consider the grounds of the same because the decree of which a review was sought was given by its predecessor, the High Court, in the exercise of its powers of superintendence under s. 15 of the High Courts' Act, directed such Court to consider the grounds.†

THIS was an application to the High Court for the exercise of its powers under s. 15 of the High Courts' Act. The petitioner applied on the 13th September 1875 to the Subordinate Judge of Mainpuri for the review of a judgment which that officer's predecessor had given on the 18th December 1874. The Subordinate Judge rejected the application in the following terms : "Upon a perusal of the petition with the record of the case, it appeared that the judgment of the former Subordinate Judge is not correct, but I have no right to interfere with his judgment, nor has the petitioner produced any new evidence. The objections of the petitioner have been determined by the former Subordinate Judge."

The Junior Government Pleader (Babu Dwarka Nath Banarji) for the Petitioner.

Pandit Nani Lal for the Opposite Parties.

The Order of the High Court was as follows :—

It is obvious that the Subordinate Judge has misconceived the duty imposed on him. The circumstance that the decree, of which a review was sought, was passed by his predecessor did not discharge the Subordinate Judge from the obligation of considering whether any sufficient grounds were shown for the application. Where a Subordinate Court has obviously failed to perform its duty, and there is no remedy by appeal, it appears to us within the competency of this Court, under the general powers of superintendence with which it is invested under s. 15 of the Letters Patent, to point out to the Subordinate Court its error and to direct it to proceed according to law. The Subordinate Judge is therefore directed to reconsider the application presented to him, and to deal with it as if a review was sought of a decree which he had himself passed.

NOTES.

[See 9 All., 104, F. B.]

*Miscellaneous Application, No. 25B of 1876, against an order of the Subordinate Judge of Mainpuri, dated the 6th January 1876.

† For other cases in which the High Court interfered under that section and directed the exercise of a power or jurisdiction disclaimed by a subordinate Court, see note to *Tej Ram v. Harsukh*, I. L. R., 1 All., 104. For cases in which it refused to interfere, see the same note and *Petition of Lukhykant Bose*, I. L. R., 1 Cal., 180; S.C., 24 W. R., 440.

[1 All. 297]

APPELLATE CIVIL.

The 24th August, 1876.

PRESENT :

MR. JUSTICE TURNER AND MR. JUSTICE OLDFIELD.

Bishan Dial and another.....Defendants

versus

Manni Ram.....Plaintiff.*

Mortgage—Foreclosure—Regulation XVII of 1806.

Where the whole of a mortgage-debt was due to the persons claiming under the mortgage jointly and not severally, and a person, entitled only to one moiety of the debt, foreclosed the mortgage as to that moiety, and sued the different mortgagors for possession of a moiety of their interest in the mortgaged property in virtue of the mortgage and foreclosure, held that the foreclosure was invalid and the suits were not maintainable.

THIS was a suit in which the plaintiff claimed from Gulab Rai and Bishan Dial possession of a 4-anna share in a certain zamindari estate, in virtue of a deed of conditional sale, dated the 13th December 1864, and an order foreclosing the mortgage, dated the 11th April 1874. The facts of the case are sufficiently [298] stated for the purposes of this report in the judgment of the High Court.

Pandit Ajudhia Nath and Munshi Hanuman Parshad for the Appellants.

Lala Lalta Parshad and Shah Assad Ali for the Respondent.

The Judgment of the High Court was as follows : -

Sarab Sukh Rai, the original proprietor of mauza Barauli, died in 1844, leaving a widow, Ram Kuar, and three sons, Sheo Dial, Gulab Rai, and Bishan Dial. In 1864 Sheo Dial, who appears to have managed the business of the family in the absence of his brothers, of whom one, Bishan Dial, was residing at Lucknow, and the other, Gulab Rai, at Cawnpore, desired to raise a loan of Rs. 13,000, in order to pay off the sums due to Daula Kuar and others, decree-holders, who were in possession of mauza Barauli and mauza Darjanpur, and for other necessary purposes ; and in order to raise the sum required, Bishan Dial, on the 23rd August 1864, executed a power-of-attorney authorizing Sheo Dial to take a loan from any person he pleased, and to execute and register in the name and on behalf of Bishan Dial "a mortgage deed" for Rs. 13,000 in respect of mauza Barauli. On the 13th September 1864, Sheo Dial, on his own behalf and as attorney for Bishan Dial, executed a deed of mortgage of mauza Barauli for the sum above-mentioned in favour of Gobind Parshad, Swami Lal, and Kashi Parshad, for a term of seven years, subject to the following condition, viz., that the mortgagors should, at the expiry of the term named, redeem the

* Special Appeal, No. 1320 of 1875, against a decree of the Judge of Cawnpore, dated the 18th September 1875, affirming a decree of the Subordinate Judge, dated the 30th January 1875.

mortgage by re-payment of the Rs. 13,000, and the interest left unpaid. After this mortgage was registered, and the money paid to Sheo Dial, the mortgagees appear to have discovered that Gulab Rai had a share in the estate, and required that he also should join in the mortgage. Accordingly, on the 9th November 1864, Gulab Rai executed a power-of-attorney in favour of Sheo Dial, in which, after reciting that Sheo Dial, had executed the mortgage of the 13th September, and had registered it, and that he had received and deposited the loan in the Government Treasury on account of all three brothers, Gulab Rai declared that he agreed and consented to the proceedings of his brother thereinbefore recited, and that he accordingly appointed his brother his attorney that he might execute "a deed of mortgage on his part also in [299] respect of mauza Barauli in favour of the mortgagees, and under conditions similar to those recorded in his own deed." On the 13th December Sheo Dial, for himself and as the attorney of his brothers, executed another deed of mortgage in favour of the same mortgagees. The deed recites the mortgage of the 13th September, that Gulab Rai had been no party to it, and that consequently the mortgagees were not content with that deed, and declares that the deed now in recital had been executed in lieu of the deed above-mentioned. By this deed Sheo Dial mortgaged the same property for the same sum as in the former deed, but with this difference, that the mortgagors bound themselves to pay compound interest on all arrears of interest, and that whereas the former deed was a deed of simple mortgage accompanied with provisions enabling the mortgagees, in the event of default, to convert it into a mortgage with possession, in the substituted deed the mortgagees are also empowered, in the event of default, to treat the simple mortgage as a conditional sale and to obtain foreclosure. In April 1865 Gobind Parshad, Swami Lal, and Kashi Parshad executed a sub-mortgage of the property to Girdhari Lal and Jagan Nath. Default having been made in payment of the sum due on the sub-mortgage, Chotai Lal, son of Girdhari Lal, and Jagan Nath, in May 1872, sued the original mortgagees and obtained decrees in execution of which they brought to sale the mortgagees' rights, and became each a purchaser of one moiety. In August 1872, Chotai Lal sold his moiety to the respondent. It appears that, on Sarah Sukh Rai's death, the estate of Barauli was recorded in the revenue registers as held by his widow and three sons in equal shares of four annas. It is alleged, nevertheless, that they remained a joint Hindu family. On the 4th December 1859, Sheo Dial mortgaged his share, described as a 5-anna 4-pie share, to Har Sahai, whose son, Raj Bahadur, obtained a decree on the mortgage-deed on April 15th, 1862. In execution of the decree, and of another decree held by one Har Dial for Daula Kuar, the 4-anna share standing in his name in the revenue registers was sold on the 20th July 1867, and purchased by Suraj Parshad. Sheo Dial died in 1866, and if the family was joint, his brothers obtained his interest by survivorship. If the family was not joint, it devolved on his daughter. On the 24th December 1867, Ram Kuar, the widow of Sarah Sukh Rai, executed a deed by which she professed to divide the 4-anna share standing in her name, and to transfer [300] a 2-anna share to Lalta Parshad, the son-in-law of Sheo Dial, and the remaining 2-anna share to Har Parshad, son-in-law of Gulab Rai.

The respondent having, as has been stated, acquired the one moiety in the original mortgage purchased by Chotai Lal, in April 1872, issued notice of foreclosure in respect of one moiety of the mortgage, and on the expiry of the year of grace he has instituted four suits. In the first he claims in virtue of the mortgage and foreclosure to obtain the possession of 4 annas out of the two shares of 4 annas each, which are still recorded in the names of Gulab

Rai and Bishan Dial respectively. In the second, on the same title, he claims possession of a 2-anna share out of the 4-anna share purchased by Suraj Parshad. In the third, on the same title, he claims possession of a 1-anna share out of the 2-anna share standing in the name of Lalta Parshad, and in the fourth, on the same title, he claims possession of a 1-anna share out of the 2-anna share standing in the name of Har Parshad. A common objection was urged in the Courts below and in this Court that the foreclosure was invalid, in that a person entitled to one moiety of a mortgage-debt cannot require the mortgagees to pay off one moiety of the mortgage-debt or to stand foreclosed of one moiety of the mortgage-money. We must allow the validity of this plea. The whole of the mortgage-debt is due to the persons claiming under the original mortgages jointly and not severally, and the mortgagors are entitled to a joint receipt for all sums they may pay in satisfaction of the debt ; nor does the foreclosure law contemplate the issue of a notice of foreclosure in respect of a portion of the unpaid mortgage-debt, except under circumstances which do not exist in this case. The notice must declare foreclosure if the whole of the subsisting debt is not paid before the expiry of the year of grace. We are, therefore, of opinion that these suits cannot be maintained, and in that opinion we are confirmed by a ruling of the Calcutta High Court—*Bhora Roy v. Abilack Roy.** It is unnecessary to consider the other pleas raised in this and the connected appeals. The decrees of the Courts below are reversed and the suits dismissed with costs.

NOTES.

[See (1886) 9 All., 68 ; (1892) 17 Mad., 12 ; (1893) 3 M. L. J., 176 ; 19 M. L. J., 221.]

* 10 W. R., 476 ; for circumstances justifying an exception to the rule that a suit must be a suit applicable to the whole property mortgaged, and a mortgagor is not to be held liable to a variety of suits and proceedings in respect of the different interests which the mortgagees may, as between themselves, possess, see *Hunoamanpersaud v. Kaleepersaud Sahoo*, W. R., 1864, p. 25, and *Indurjeet Koonwyr v. Brij Bilas Lall*, 3 W. R. 189.

[801] FULL BENCH.

The 28th April, 1876.

PRESENT:

SIR ROBERT STUART, Kt., CHIEF JUSTICE, MR. JUSTICE PEARSON,
 MR. JUSTICE TURNER, MR. JUSTICE SPANKIE AND MR. JUSTICE OLDFIELD.

Hanuman Parshad.....Plaintiff

versus

Kaulesar Pandey.....Defendant.*

Act X of 1859, ss. 3, 4—Act XVIII of 1873, ss. 5, 6—Rent in kind (Bhaoli)—Enhancement of rent—Tenant at a fixed rate.

A rent in kind (*bhaoli*) which, though it varies yearly in amount with the varying amount of the yearly produce, is fixed as to the proportion it is to bear to such produce, is a fixed rent within the meaning of s. 3 $\frac{1}{2}$ of Act X of 1859 (corresponding with s. 5 of Act XVIII of 1873). A tenant, therefore, in a permanently-settled district, holding his land at such a rent, is entitled to claim the presumption of law declared in s. 4 $\frac{1}{2}$ of Act X of 1859 (corresponding with s. 6 of Act XVIII of 1873) if he proves that, for a period of twenty years next before the commencement of the suit to enhance his rent, he has paid the same proportion of the produce of his holding.

The decision of the High Court in *Hanuman Parshad v. Ramjug Singh* (H. C. R. N.-W. P., 1874, p. 371) impugned, and of the Calcutta High Court in *Yacoob Hossein v. Wahid Ali* § dissented from.

THIS was a suit to enhance the rents of certain lands held by the defendant. The Court of First Instance, applying the presumption of law declared in s. 4 of Act X of 1859, held that the rents were not liable to enhancement and dismissed the suit. On appeal by the plaintiff the lower Appellate Court gave him a decree in respect of certain of the lands for which the defendant paid rent in kind (*bhaoli*), holding, with reference to the ruling of the High Court in *Hanuman Parshad v. Ramjug Singh* (H. C. R., N.-W. P., 1874, p. 371), that the presumption of law laid down in s. 4 of Act X of 1859 was not applicable to such lands.

On special appeal by the plaintiff to the High Court it was contended, *inter alia*, that the presumption did not apply to certain other lands also, as the rents of the same were paid in kind.

* Special Appeal, No. 733 of 1875, against a decree of the Judge of Benares, dated the 15th May 1876, modifying a decree of the Collector, dated the 8th July 1874.

† [Sec. 3 :—Ryots who in the Provinces of Bengal, Behar, Ryots holding land at Orissa and Benares, hold lands at fixed rates of rent which have fixed rates to receive not been changed from the time of the permanent settlement pottahs. are entitled to receive pottahs at those rates.]

‡ [Sec. 4 :—Whenever, in any suit, under this Act it shall be proved that the rent at which land is held by a ryot in the said Provinces, has not been changed If rent of land be not for a period of twenty years before the commencement of the changed for 20 years. suit, it shall be presumed that the land has been held at that rent from the time of the permanent settlement, unless the contrary be shown, or unless it be proved that such rent was fixed at some later period.]

94 W. R., Act X, Rulings, 23 ; S.C., 1 Ind. Jur. N. S. 29. This case was followed in *Thakoor Pershad v. Mahomed Baker*, 8 W. R., 170; see, however, *Ram Dayal Singh v. Latchmi Narayan*, 6 B. L. R., App. 26, S.C. 14 W. R., 888, in which the Court expressed a doubt as to its correctness.

The Court (PEARSON and SPANKIE, JJ.) referred to the Full Bench the question whether the ruling of the High Court above mentioned was correct or not.

[302] The Junior Government Pleader (Babu *Dwarka Nath Banarji*) and Pandit *Bishambhar Nath*, for the Appellant.

Maulvi *Ruhullah*, for the Respondent.

Stuart, C. J., Turner, Spankie and Oldfield, JJ., concurred in the following Opinion :—

This suit falls to be decided under Act X of 1859. By the third section of that Act it was declared that ryots who, in the provinces therein mentioned, hold lands at fixed rates which have not been changed since the permanent settlement, are entitled to receive pottahs at those rates. This provision was introduced to give effect to the design announced by Government, when it established the permanent settlement, that the ryot as well as the zamindar should derive benefit from the boon. There is nothing in the section which limits its operation only to ryots who pay rent in cash. Ryots who pay rent in grain may, therefore, claim the privilege, if they can establish that the rates at which they have held their lands are fixed rates. In the case suggested the land is held on the terms that the tenant shall render to the landlord in each year a fixed share of the crop. The quantity of produce delivered may vary in each year, but the rate or share remains the same, be it a fourth or a third or a half, as the case may be. The rate of rent does not vary, although its quantum or value may. If then the tenant proves that no alteration in the rate has been made since the permanent settlement, or entitles himself to the benefit of the presumption declared in s. 4 of the Act, he may demand a pottah at these rates as fixed rates.

Pearson, J.—On re-consideration I am of opinion that the ruling *Yacoob Hossein v. Wahid Ali* (4 W. R., Act X Rulings, 23; S.C., 1 Ind. Jur. N. S. 29) which was followed in *Hanuman Parshad v. Ramjug Singh* (H. C. R., N.-W. P., 1874, p. 371) is not maintainable in reference to the terms of ss. 3, 4 and 5, * Act X of 1859. Sections 3 and 5 show that the word "rent" used in s. 4 means the rate of rent, and whether or not the Legislature when enacting these sections had in view a rent paid in the shape of a proportion of the produce, it is impossible to hold that the terms used will not include such a rent as well as a money-rent, and that a ryot in the Province of Benares who claims to hold at fixed rates, and [303] proves that he has for a period of twenty years before the commencement of a suit paid as rent the same proportion of the produce of his holding, is not entitled to the presumption which s. 4 declares.

*[Sec. 5 :—Ryots having rights of occupancy, but not holding at fixed rates, as described in the two preceding sections, are entitled to receive pottahs at fair and equitable rates. In case of dispute, the rate previously paid by the ryot shall be deemed to be fair and equitable, unless the contrary be shown in a suit by either party under the provisions of this Act.]

Ryots having right of occupancy, but not holding at fixed rates, to receive pottahs.

[1 All. 303]

APPELLATE CIVIL.

The 16th August, 1876.

PRESENT:

MR. JUSTICE TURNER AND MR. JUSTICE SPANKIE.

Salamat Ali and others.....Plaintiffs
versus

Budh Singh and others.....Defendants.*

Mortgagor and mortgagee—Constructive fraud.

Mere silence on the part of a prior mortgagee on hearing that the mortgagor is mortgaging the property a second time is not such conduct as will amount to constructive fraud, and deprive him of his right to priority as against the second mortgagee.

Neither does the mere fact that, being aware of the second mortgage, he attests the execution of the mortgage-deed, amount to such conduct, where his knowledge of the contents of the deed is not shown.

Where a prior mortgagee, however, attested the execution of the deed, mortgaging the property a second time, and, being aware of the contents of the deed, kept silence, and thus led the second mortgagee to think that the property was not encumbered, and to advance his money on the security of it, which the second mortgagee would not have done had he been aware of the existence of the prior mortgage, such silence was held to be conduct which amounted to constructive fraud on the part of the prior mortgagee and deprived him of his right to priority.†

THIS was a suit for money charged on immoveable property. The facts of the case and the arguments in special appeal sufficiently appear from the order of the High Court remanding the case under s. 354, Act VIII of 1859.

[304] Pandit Ajudhia Nath and Pandit Bishambhar Nath, for the Appellants.

Mr. Mahmood, for the Respondents.

The Order of the High Court was as follows:—

The appellants allege that their brother Mansab Ali having incurred debts, borrowed Rs. 400 from them wherewith to discharge the debts, and to secure

* Special Appeal, No. 1062 of 1875, against a decree of the Subordinate Judge of Agra, dated the 30th August 1875, modifying a decree of the Munsif of Jalesar, dated the 29th June 1875.

† See also *Rai Seeta Ram v. Kishun Dass*, H. C. R., N.-W. P., 1868, p. 402, in which case it was held, where a prior mortgagee stood by and allowed the mortgagor to deal with the property as if it were unencumbered, while the second mortgagee, acting in the belief that he was taking a security free from encumbrance, advanced his money upon it at the solicitation of the prior mortgagee, that the prior mortgagee had lost his right to priority by reason of his conduct. See also *MacConnell v. Mayer*, H. C. R., N.-W. P., 1870, p. 315, in which case it was held, where a decree-holder brought to sale in execution of his decree property on which he held a mortgage without notifying his encumbrance on it, and on being asked by an intending bidder at the time of the sale whether there was any encumbrance on the property, gave an evasive answer which misled the bidder and induced him to purchase the property as unencumbered, that such decree-holder could not subsequently claim as against such bidder to enforce his mortgage.

the repayment of the loan executed a mortgage of the property which the appellants now claim to bring to sale for its satisfaction. The mortgage-deed in favour of the appellants was duly registered. On the 3rd August 1870, Mansab Ali having become still more involved in debt, borrowed Rs. 2,000 from Pirthi Singh, and again hypothecated the property. One of the appellants, Intizam Ali, was a witness to the execution of the mortgage. On the 16th February 1871, Mansab Ali took Rs. 2,600 from Budh Singh to pay off the mortgage due to Pirthi Singh and for other purposes, and hypothecated the property to Budh Singh. The debt due to Pirthi Singh was discharged out of the loan taken from Budh Singh. The appellant Salamat Ali witnessed the execution of the mortgage-deed in favour of Budh Singh. This deed does not contain any statement to the effect that no mortgage subsisted on the property, nor is there any allegation that the mortgagee inquired of any of the appellants whether or not there were any charges on the property. Budh Singh brought a suit on his mortgage-deed and obtained an order for sale. The appellants were not parties to this suit, but they caused the lien they now claim to enforce to be notified at the time of the sale. The property was purchased by the respondents for a sum of Rs. 5,000. It therefore is apparent that, at the time the mortgage was executed in favour of Budh Singh, its value was more than sufficient to discharge that debt as well as the debt due to the appellants.

The respondents pleaded that the appellants are estopped from enforcing their lien because they fraudulently concealed their charge, and they further pleaded that the charge created in the appellants' favour was a merely nominal transaction for the purpose of protecting Mansab Ali's property from his creditors, or that, if *bona fide*, the debt had been discharged.

[305] The Court of First Instance held mortgage-deed executed in favour of the appellants to have been a *bona fide* transaction, and disbelieved the witnesses called to prove that the money had been refunded. As to the plea of estoppel the Court found that, regard being had to the value, there could have been no intention on the part of the appellants to deceive the second encumbrancers, inasmuch as it was ample to satisfy both charges, and that the mere attestation of the subsequent encumbrance was not sufficient to create estoppel. It therefore decreed the claim. On appeal the same pleas were urged by the respondents, the then appellants, as they had pleaded in the Court of First Instance. The lower Appellate Court held that the appellants had purposely and intentionally concealed their prior demands, and that, had they mentioned them, the subsequent creditors would either have abstained from lending their money or would have considered their advantages and disadvantages. The lower Appellate Court, without determining the other pleas, reversed the decree of the Court below and dismissed the suit.

It is contended that there was no sufficient evidence to justify the lower Appellate Court in finding that the appellants fraudulently concealed their mortgage, and the mortgagees had been deceived by them, and that at least a distinction should have been made between such of the appellants as did not attest the deed under which the property had been sold and the appellant who attested it.

It is conceded that all that is proved against the appellants Mumtaz Ali and Akbar Ali is that, being brothers of the mortgagor and cognisant of his dealings with his property, they remained silent and did not give the mortgagees notice of their lien. In addition it is proved against Intizam Ali that he attested the deed executed in favour of Pirthi Singh, and it is proved against

Salamat Ali that he attested the deed under which the property was sold. Are these circumstances sufficient to deprive all or any and which of the appellants of the right to enforce their lien?

Although the plea has not been taken in special appeal, we may express our opinion that the respondents, who now hold the property in virtue of their purchase at auction, are entitled to put forward the same pleas as might have been urged by the mort-[306]gagees had the question of priority arisen before the sale. Although they purchased with a knowledge of the appellants' claim, they also knew that the claim was contested, and the notification of the claim at the sale could not restore to the appellants priority if they had already lost it. Had they or have any of them lost it?

It is a rule of equity that where a man by his conduct or language wilfully causes another to conceive an erroneous impression and to act upon the impression he has so formed and to alter his position, he cannot afterwards be allowed to claim any benefit for himself by asserting that the facts were contrary to the impression he had produced, and it may be added that a man must be presumed to intend the natural consequences of his conduct or language. If a man stands by and sees another sell property which belongs to him, he is bound to proclaim his title. If he fails to do so and a stranger is induced by his silence to believe he has no title, and under that impression expends his money on the purchase of the property, equity holds the man so standing by, if he fails to explain his silence, guilty of constructive fraud and postpones his title to that of the purchaser. The cases on this point are noted in Story's Equity Jurisprudence, s. 393, and in Fisher on Mortgages, s. 1541. It is, however, of the essence of constructive fraud that the person sought to be charged therewith should be proved to have concurred or co-operated in some deceit or to have been guilty of gross negligence. It is not therefore enough to show merely that a man, knowing that persons are dealing with his property out of his presence, keeps silence—Story's Equity Jurisprudence, s. 394. "A mortgagee need not go out of his way to give notice of his security upon hearing that the mortgagor is dealing with the estate"—Fisher on Mortgages, s. 1541. But if a person who proposes to make an advance on a property informs a mortgagee of his intention in such a manner as to show that he intended to be guided by what he might hear from the mortgagee and the mortgagee remains silent, still more if a direct inquiry is made of the mortgagee and he remains silent, then in either of these cases the mortgagee will be held guilty of constructive fraud. Again, although the mere attestation of the execution of a mortgage-deed by a prior mortgagee is not, as it was at one time held to be, sufficient to create estoppel, because it does not necessarily follow that a witness is aware of the contents of the [307] deed of which he attests the execution, yet where that knowledge is brought home to him, and there are circumstances to show that he acted dishonestly and disingenuously to the mortgagee, and the mortgagee was in consequence deceived, the prior mortgagee will be deprived of his priority.

Applying these principles to the case before us we are unable to hold there was any sufficient evidence to justify the lower Appellate Court in finding the appellants Mumtaz Ali and Akbar Ali guilty of constructive fraud, and therefore debarred from insisting on their claim. Looking to the value of the property, it may well be doubted whether there was a design on the part of any of the appellants to deceive the mortgagee. However this may be, Mumtaz Ali and Akbar Ali simply remained silent, although cognisant of the fact that their brother was dealing with the mortgaged property elsewhere. Nor does the

case seem stronger against Intizam Ali. He, it is true, attested the deed executed in favour of Pirthi Singh, but the sale was not made under that deed, nor was the mortgage executed in favour of Pirthi Singh kept alive and assigned to the subsequent mortgagee. So far as concerns Budh Singh, Intizam Ali simply remained silent. We hold that the facts proved did not justify the lower Appellate Court in holding Intizam Ali had concurred or co-operated in any fraud practised on Budh Singh.

Against Salamat Ali there is the circumstance that he attested the execution of the deed of mortgage in favour of Budh Singh, that he was the brother of the mortgagor and in constant intercourse with him, whence it may be inferred he was aware of the contents of the deed he witnessed, and lastly, that possessing this knowledge he kept silent as to the existence of a prior lien in favour of himself and his brothers. Under these circumstances, if Budh Singh was deceived, it would be competent to the Court to find that Salamat Ali wilfully misled Budh Singh and so co-operated and concurred in that deceit, and to hold that, in consequence, his interest in the alleged prior encumbrance must be postponed to that of Budh Singh and those who purchased under Budh Singh's mortgage. (Being of opinion that there had been no sufficient investigation of the issue whether Budh Singh was deceived by Salamat [308] Ali's silence, and to enable it to pass final orders in this appeal, the Court remanded the case for the trial of the following issues : (i) Was the mortgage on which the appellants rely executed *bona fide* and for good consideration ? (ii) If it was so executed, has the debt so created been discharged ? (iii) Was Budh Singh ignorant of the mortgage on which the appellants rely, and if he had known of its existence, would he have declined to advance his money on the security of the property ?)

The lower Appellate Court determined the first two of the issues above mentioned in favour of the appellants, and the third issue in favour of the respondents.

The Judgment of the Court (after accepting the findings of the lower Appellate Court on the first two issues) was as follows :—

We accept the finding that Budh Singh would not have agreed to take a second mortgage of the property had he been aware of the existence of the prior mortgage in favour of the appellants. He was about to advance a large sum on the property of which the bulk was, as he knew, and as Salamat Ali must have known, to be applied to extinguish existing encumbrances, and had he been aware of the lien held by the appellants it may reasonably be inferred he would have insisted on its satisfaction out of the moneys he had advanced. Each case must of course be governed by its own circumstances, but on the facts found in this case we must hold that Salamat Ali has by his silence lost his right to priority so far as his interest in the mortgage is concerned.

It must also be presumed that the shares of the four brothers in the mortgage-debt were equal. The decree of the lower Appellate Court, so far as it dismisses the claim in respect of three-fourths of the mortgage-debt and interest is reversed, being the shares of Mumtaz Ali, Intizam Ali, and Akbar Ali, and the decree of the Court of First Instance to this extent restored, but the decree of the lower Appellate Court, so far as it dismisses the claim to one-fourth of the mortgage-debt, being the share of Salamat Ali, is affirmed. The appellants will recover three-fourths of their own costs in all Courts from the respondents and pay one-fourth of the respondents' costs. The respondents or either of

them are of course at liberty to pay off the three-fourths of the mortgage-debt, interest, and costs, and to prevent a sale.

NOTES.

[ATTESTATION—ESTOPPEL—

As to how far attestation operates as an estoppel, see, 12 M. L. T., 211; 12 I. C., 891; (1898) 1 O. C., 252.]

[309] APPELLATE CIVIL.

The 21st August, 1876.

PRESENT:

MR. JUSTICE TURNER, AND MR. JUSTICE SPANKIE.

Manna Lal.....Defendant

versus

The Bank of Bengal.....Plaintiff.*

Act IX of 1872 (Contract Act), ss. 2 (d), 25—Consideration—Agreement without consideration—Void agreement.

While certain hundis were running the acceptor gave the holder, the drawer having become bankrupt, a mortgage of certain immoveable property as security for the payment of the hundis in the event of their dishonour when they became due. *Held*, in a suit on the mortgage-deed, the hundis having been dishonoured, that there was no consideration, within the meaning of that term in Act IX of 1872, for the agreement of mortgage, and the same was void under s. 25† of that Act.

THIS was a suit to recover Rs. 5,000 on a mortgage-deed, dated the 21st May 1874. One Rai Lakshmi Chand, of Benares, drew two hundis, each for

* Special Appeal, No. 566 of 1876, against a decree of the Judge of Cawnpore, dated the 17th March 1876, modifying a decree of the Subordinate Judge, dated the 2nd August 1875.

Agreement without consideration void—[†] [Sec. 25 :—An agreement made without consideration is void unless.

unless it is in writing and registered

(1) it is expressed in writing and registered under the law for the time being in force for the registration of documents and is made on account of natural love and affection between parties standing in a near relation to each other ; or unless

(2) it is a promise to compensate wholly or in part a person who has already voluntarily done something for the promisor or something which the promisor was legally compellable to do ; or unless

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate ; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.]

Rs. 2,500, the one payable on the 15th June 1874, the other on the 19th June 1874, on the defendant's firm at Cawnpore. These hundis were endorsed to the Bank of Bengal and discounted by the Agent of that Bank at Benares, and were then forwarded to the Agent of the Bank at Cawnpore, and by him presented to the defendant and accepted. On the 18th May 1874, the Agent at Cawnpore was informed that the drawer of the hundis was bankrupt. He immediately applied to the defendant to give security for the amount of the hundis, and on the 21st May 1874, the defendant executed the deed of mortgage in suit. This deed, after reciting that the defendant was the acceptor of the hundis, that as such he was liable thereon, and that the amount of the hundis was due to the Bank of Bengal from him and payable by him, proceeds as follows: "I, therefore, of my one free-will and pleasure, agreeably to the request of the Bank of Bengal for security for the amount of the hundis due to the Bank of Bengal, Cawnpore branch, do hereby hypothecate and pledge for the said amount a house and six shops situated in the Chauk in the city of Cawnpore, and a bungalow situated in the Cawnpore Cantonment, and execute this by way of a collateral security-bond. . . . The hypothecated property shall remain hypothecated and pledged as long as the amount [310] of the hundis is not paid. The said Bank of Bengal is at liberty to realize on account of the hundis the amount thereof from the hypothecated property and from me in any manner it likes." On the 24th June 1874 the Bank of Bengal instituted a suit against the drawer of the hundis and the defendant in this suit at Benares to recover the sums due on the hundis, which had been dishonoured on maturity. As the defendant neither resided nor carried on business at Benares, application was made to the High Court to sanction the trial, which sanction was refused. The Bank thereupon amended the plaint in that suit and sued the drawer alone, and obtained a decree, which at the time of the present suit was unsatisfied. On the 9th March 1875 the present suit was instituted.

The defendant pleaded, among other pleas, that the mortgage was obtained from him on the promise that the Bank would exhaust every means to obtain payment of the hundis from the drawer before recourse was had to the acceptor. The Agent of the Bank denied that any such promise was made, or that he had any authority to make any promise in the matter. The Court of First Instance found that no such promise was made.

On appeal the defendant again urged that the mortgage had been made in consideration of the promise made by the Agent of the Bank at Cawnpore, and he further pleaded that, if no such promise was made, there was no consideration for the mortgage, and the contract was void under s. 25, "Act IX of 1872. The lower Appellate Court found that no promise had been made, and held that, inasmuch as the acceptor of a bill derives benefit reciprocally with the drawer in banking transactions, and that both are liable for the prompt discharge of the bill on its arriving at maturity, any security given meanwhile by either of them is not devoid of consideration, inasmuch as it carries with it the prospect of a deferred demand for the money.

On special appeal to the High Court by the defendant it was again contended that, there being no consideration for the agreement of mortgage, the agreement was void under s. 25, Act IX of 1872.

Mr. Raikes, for the Appellant.

Mr. Colvin and *Mr. Conlan*, for the Respondent.

• "[q. v. supra 1 All., 309.]

The Judgment of the Court, so far as it related to the above contention, was as follows :—

[311] But we must admit the validity of the plea that the contract of mortgage is void under the provisions of s. 25 of the Contract Act. We do not quite understand the Judge's argument as to the benefit which the appellant derived from the banking transaction. It does not appear that he had received any portion of the hundis when discounted ; but, assuming that he had done so, and admitting that under the circumstances he was liable on the hundis, neither the antecedent benefit, nor the existing liability, nor the anticipated advantage to which the Judge alludes, would constitute a consideration as defined in the Contract Act. To constitute a consideration as defined in that Act there must be an act, abstinence, or promise on the part of the promisee or some other person at the desire of the promisor. On the facts found there was no such act, abstinence, or promise, and therefore there was no consideration for the mortgage, and the contract is void. On this ground we must allow the appeal, and reversing the decrees of the Courts below so far as they decree the claim, we must dismiss the suit with costs.

NOTES.

[See (1896) 22 Bom., 176. The same principles would apply in cases under the Transfer of Property Act, 1882. See Pollak & Mulla, Indian Contract Act (1913) . p. 156.]

[1 All. 311]

FULL BENCH.

The 21st August, 1876.

PRESENT :

SIR ROBERT STUART, K.T., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, MR. JUSTICE SPANKIE, AND MR. JUSTICE OLDFIELD.

Jageshar Singh.....Plaintiff

versus

Jawahir Singh and others.....Defendants.*

Act IX of 1871, sch. ii, 10.—Pre-emption—Limitation—“ Actual possession.”

Held (STUART, C. J., dissenting) that the purchaser of the equity of redemption of immoveable property, which is at the time of sale in the usufructuary possession of the mortgagee, takes “actual possession” of the property, within the meaning of that term in art. 10†, sch. ii of Act IX of 1871, when the equity of redemption is completely transferred to and vested in him.

* Special Appeal, No. 1028 of 1875, against a decree of the Subordinate Judge of Ghazipur, dated the 24th June 1875, affirming a decree of the Munsif of Saidpur, dated the 4th December 1874.

† [Art. 10 :—

Description of suit.	Period of limitation.	Time when period begins to run.
To enforce a right of pre-emption, whether the right is founded on law, or general usage, or on special contract.	One year	When the purchaser takes actual possession under the sale sought to be impeached.]

Per STUART, C. J.—That such a purchaser does not take “actual possession” of the property until he takes visible and tangible possession thereof or enjoys the rents and profits of the same, after redemption of mortgage.

THIS was a suit to enforce the plaintiff's right of pre-emption of a share in a certain zamindari village and for possession of the same. The right of pre-emption was founded upon a special con-[312]tract in the village administration-paper. The deed of sale which the suit impeached was dated the 15th September 1873, at which date the property was in the possession of certain usufructuary mortgagees. The deed recited that the vendees were entitled to possession on the 31st May 1874, by redemption of the mortgage. The suit was instituted on the 5th October 1874.

The lower Appellate Court dismissed the suit as instituted after the period of limitation prescribed therefor by art. 10, sch. ii of Act IX of 1871, holding that that period began to run from the date of the sale.

On special appeal by the plaintiff to the High Court, the Court (TURNER and OLDFIELD, JJ.) referred to the Full Bench the question as to the time from which the period of limitation began to run.

The order of reference was accompanied with the following remarks :—

By art. 10, sch ii, Act IX of 1871, the period begins to run “when the purchaser takes actual possession under the sale sought to be impeached.” The terms of the former Act were—“the time at which the purchaser shall have taken possession under the sale impeached.” The word “actual” has thus been introduced in the present Act, and there appears a doubt as to the object of this change, whether in the case before us the possession meant is possession by enjoyment of the profits on expiry of the term of the mortgage, or whether such possession as the nature of the property admits of is all that is intended, dating in this case from the time of the sale.

Munshi Hanuman Pershad, for the Respondents, contended that “actual possession” mean visible and tangible possession, or enjoyment of the rents and profits of the property, after redemption of mortgage. The meaning of the term “possession” in the former Limitation Act was doubtful, as is shown by conflicting rulings. For instance, in *Gordhun v. Heera Singh* (S. D. A., N.-W. P. January to May 1866, p. 181; this case followed *Gobind Parshad v. Bebee Fatima*, 2 W. R. 5), the Full Bench of this Court held that it meant actual, that is, visible and tangible possession, while in *Gangeshee Lall v. Toola Ram* (H. C. R., N.-W. P., 1868, p. 376; followed in *Mashook Ali Khan v. Imdad Ali Khan*, H. C. R., N.-W. P., 1869, p. 9; see also *Bachun v. Yakoob Khan*, 3 W. R., 225) it held that it meant such [313] possession as the nature of the property admits of. The word “actual” has been introduced into the present Limitation Act to remove all doubts as to the meaning of the term “possession.”

Pandit Ajudhia Nath (with him the Senior Government Pleader, Lala Juala Parshad), for the Appellant, contended that, when a purchaser acquired such possession of the property sold as the nature of the property admitted of, he was in “actual possession” of the property.

Stuart, C.J.—I am clearly of opinion that the possession intended in art. 10, sch. ii, Act. IX of 1871, is possession by enjoyment of the profits on

expiry of the term of the mortgage. The time mentioned in the former Act was "the time at which the purchaser shall have taken possession under the sale impeached," and the meaning of this being doubtful, as various rulings of the Calcutta Court and this Court show, the word "actual" has been introduced into the present Act with the view no doubt of making it plain what the real date was intended to be. Actual possession, in my opinion, means personal and immediate enjoyment of the profits; and as in the present case the mortgagee was in possession at the time of the sale, the purchaser could not take actual possession till the mortgage-term had expired. And this is my answer to the reference.

Pearson, J.—The possession of a mortgagee is tantamount to the possession of the mortgagor or his vendee, and does not interfere with his equity of redemption. Nor can the latter be said not to be in possession by enjoyment of the profits when those profits are applied to the liquidation of the mortgage-debt for which the property purchased by him is liable. He may when he has taken his vendor's place, be reasonably held to have obtained actual possession under the sale, and from the date on which he acquired it will run the limitation prescribed by art. 10, sch. ii, Act IX of 1871. The introduction of the word "actual" in that article seems to render the terms used more precise than those used in the former Act, and to adopt the full Bench ruling in *Ganeshee Lall v. Toola Ram* (H. C. R., N.-W. P., 1868, p. 376) rather than to negative it, and make any change in the law.

[314] **Turner, Spankie and Oldfield, JJ.**, concurred in the following Opinion :—

The provisions of the former law, Act XIV of 1859, declared that in suits for pre-emption the period of limitation should be computed from the time at which the purchaser shall have taken possession under the sale impeached. On the construction of the term "possession" this Court held in *Ganeshee Lall v. Toola Ram* (H. C. R., N.-W. P., 1868, p. 367), that such possession was intended as the nature of the thing sold admitted of, and that it did not necessarily mean tangible or visible possession. Thus, where a property was in the possession of the mortgagee, and the rights of the mortgagor were sold, it was held that possession was acquired under the sale as soon as the right of redemption was completely transferred to the purchaser, and that limitation must be computed from that period and not from a subsequent date when the mortgage having been discharged from the usufruct the purchaser was able to resume possession. It was pointed out that at the time of the sale two persons had rights in the property, the mortgagor and the mortgagee, and that the subject of the sale was the right of the mortgagor as it subsisted at the time of the sale. Seeing that the purchaser had purchased the right to recover and enjoy the profits at an indefinite period, for it could not be ascertained with certainty at what date the debt and interest would be discharged from the usufruct, it was deemed inequitable to allow a pre-emptor to obtain the property in 1867 freed from mortgage at the price paid by the purchaser in 1860 for the estate encumbered with the mortgage. As an analogous case it was suggested that, if land were leased for a certain term at a nominal rent, and during the term the lessor sold and conveyed the reversion to a purchaser, although the purchase would not have conferred on the purchaser the right to any immediate profit from the estate, the subject of the sale would have been his and in his possession, for all intents and purposes, as completely as before the sale it was in the possession of the vendor.

The language of the present Limitation Act, IX of 1871, differs somewhat from that of the former in declaring the date from which [315] the period of limitation is to be computed in suits for pre-emption. In sch. ii, cl. 10, it is declared the period begins to run when the purchaser takes actual possession under the sale impeached, and the question put to us is, whether there has been any change in the law, whether by actual possession we are to understand in all cases visible and tangible possession or such possession as the nature of the subject of the sale allows.

We have felt some difficulty in determining this question, for it may be presumed the term actual was not introduced without a purpose. But it will equally apply to subjects of sale which admit of visible and tangible possession as well as to subjects of sale which do not admit of such possession. The purchaser of an equity of redemption or of a right of reversion is, it must be allowed, actually in possession of what he has purchased, when the rights of the mortgagor or lessor have been completely transferred to and vested in him. In the one case he and he only could maintain suit for any injury to the reversion, in the other he and he alone could maintain suit for damage done by the mortgagee to the property mortgaged in contravention of the terms of the mortgage. We are pressed, too, by the argument in *Ganeshee Lall v. Toola Ram* (H. C. R., N.-W. P., 1868, p. 367), that it would be inequitable to allow a pre-emptor to lie by for a number of years to see whether the purchase was beneficial or otherwise, and to come in and claim the benefit of the sale when the subject of the sale is freed from the encumbrance existing at the time of the sale, or where its market-value may have considerably increased. Of course if the language of the law admitted but one construction we could not allow this consideration to influence us, but where it is not incompatible with a construction that avoids hardship and injustice, we are at liberty to adopt that construction. It appears to us that full effect is given to the term actual possession if it be held that, where the nature of the subject of the sale admits of visible and tangible possession, limitation will run from the period when tangible possession is taken, but that when the nature of the subject of the sale does not admit of tangible possession, limitation runs from the date when the subject of sale is completely conveyed to and vested in the purchaser, and he has acquired such possession as before the sale was enjoyed by the seller.

[316] APPELLATE CIVIL.

The 5th December, 1876.

PRESENT :

MR. JUSTICE PEARSON AND MR. JUSTICE SPANKIE.

Jadu Lal.....Plaintiff

versus

Ram Gholam and another.....Defendants.*

Act VIII of 1859, s. 2—Res judicata.

When a plaintiff claims an estate, and the defendant, being in possession, and knowing that he has two grounds of defence raises only one, he shall not, in the event of the plaintiff obtaining a decree, be permitted to sue on the other ground to recover possession from the plaintiff.

Where, therefore, the defendants purchased an estate in the plaintiff's possession, and sued him to recover possession of it, and the plaintiff resisted the suit merely on the ground that the sale to the defendants was fraudulent and without consideration, and the defendants obtained a decree, and the plaintiff then sued claiming a right of pre-emption in respect of the property—a claim which he might have asserted in reply to the former suit, held that he was debarred from suing to enforce such claim.

Baldeo Sahai v. Bateshar Singh (I. L. R., 1 All. 75) followed.

As this case merely follows the decision in *Baldeo Sahai v. Bateshar Singh*, it is not reported in detail (*Baldeo Sahai v. Bateshar Singh* was again followed in S. A. No. 998 of 1876, decided the 16th December 1876).

[1 All. 316]
APPELLATE CRIMINAL.*The 6th December, 1876.*

PRESENT :

MR. JUSTICE PEARSON.

The Queen

versus

Peterson.

Bigamy—Attempt—Publication of the banns of marriage.

The act of causing the publication of banns of marriage is an act done in the preparation to marry, but does not amount to an attempt to marry (for acts amounting only to a preparation to commit forgery, and not to an attempt to commit that offence. See *Queen v. Ramsarun Chowbey*, H. C. R., N.-W. P., 1872, p. 46).

Where therefore a man, having a wife living, caused the banns of marriage between himself and a woman to be published, he could not be punished for an attempt to marry again during the lifetime of his wife.

* Special Appeal, No. 819 of 1876, against a decree of J. W. Power, Esq., Judge of Ghazipur, dated the 13th April 1876, reversing a decree of Sultan Hussain, Additional Subordinate Judge, dated the 27th May 1875.

Mr. C. Donovan, Magistrate of the first class, on the 7th June 1876, committed Peter Peterson, a European, to the Court of Session for trial on the following charge amongst others, *viz.*, that he, in or about the end of December 1875, and beginning [317] of January 1876, attempted to marry Ethel Amanda Guise, by causing the publication of the banns of marriage between them, when he, being a Christian, had a wife alive, and that he had thereby committed an offence under ss. 494, 511 of the Indian Penal Code.

In a trial by jury held by Mr. H. G. Keene, the Sessions Judge of Agra, on the 27th July 1876, he was convicted on that charge, and sentenced to three years' rigorous imprisonment.

Peterson appealed to the High Court.

Mr. Ross, for the Appellant.

The Junior Government Pleader (*Babu Dwarka Nath Banarji*), for the Crown.

Pearson, J.—I proceed to consider whether the prisoner has been rightly convicted of an attempt to commit the offence defined in s. 494, Indian Penal Code. He was charged with and has been found guilty of, "attempting to marry E. A. Guise by causing the publication of the banns of marriage between them when he, being a Christian, had a wife alive." The question shortly is whether the publication of the banns of marriage is an attempt to marry. An attempt to commit a crime is to be distinguished from an intention to commit it and from preparation made for its commission. "Preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission after the preparations have been made"—Mayne's Commentaries on s. 511, Indian Penal Code. In one of the cases cited by Mr. Mayne in his Commentaries on the Indian Penal Code in illustration of the above doctrine, it was ruled that there could be no attempt to contract a marriage until the parties stood before the Magistrate about to begin the ceremony. It would follow in the present case that the publication of the banns was not an attempt on the prisoner's part to marry Miss Guise, but only a preparation for such an attempt. The publication of banns may or may not be, in cases in which a special license is not obtained, a condition essential to the validity of a marriage, but common sense forbids us to regard either the publication of the banns or the procuring of the license as a part of the marriage ceremony. If the rule laid down in America, that an attempt can only be manifested by acts which would end in the [318] consummation of the offence, but for the intervention of circumstances independent of the will of the party, be accepted, it is clear that the Prisoners' Act, in causing the banns of marriage between himself and Miss Guise to be published was not, in the eye of the law, an attempt to marry her, inasmuch as he might, before any ceremony or marriage was commenced, have willed not to carry out his criminal intention of marrying her. For the reasons above stated the verdict of the jury by which the prisoner is convicted of an offence punishable under ss. 511, 494, Indian Penal Code, and the sentence passed on him under those sections by the Sessions Court, must be and hereby are annulled.

I.L.R. 1 All. 319 IN THE MATTER OF THE PETITION OF BISH NATH [1876]

[1 All. 318]

FULL BENCH.

The 16th December, 1876.

PRESENT :

SIR ROBERT STUART, K.T., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, MR. JUSTICE SPANKIE, AND
MR. JUSTICE OLDFIELD.

In the matter of the petition of Bish Nath.

*Act VIII of 1871 (Registration Act), s. 73—Refusal to register—Petition to have document registered—Person “claiming” under document.**

A deed of sale, executed by the vendor alone, which recited that the vendor had received the purchase-money, and that the purchaser had been put into possession, was presented for registration by the vendor, the purchaser not being present. The Registrar refused to register the document on the ground that the deed had not been delivered, and no consideration had passed, the vendor having stated that he had not received the purchase-money. In refusing to register, the Registrar believed that the deed was of the vendor's own creation. The vendor applied by petition to the High Court to establish his right to have the document registered. The alleged purchaser repudiated the sale.

Held (by the majority of the Full Bench), that as it appeared on the face of the document itself that the petitioner was not a person “claiming” under it, the petition could not be entertained under the provisions of s. 73 of the Registration Act.

Per STUART, C.J.—That the mere fact that it did not appear on the face of the deed that the petitioner could claim under it did not preclude the Court from entertaining the petition, but that, under the circumstances of the case, the registration of the deed should not be ordered.

Per OLDFIELD, J.—That it was the duty of the Court to order the registration of the deeds as it was duly executed and the requirements of the law fulfilled, without entering into the question whether, or not the petitioner could claim under it.

[319] THIS was a petition to the High Court to establish the petitioner's right to have a deed of sale registered. The material portion of the deed, which was dated the 8th May 1875, was as follows:—“I, Bish Nath, hereby sell all the property detailed below to Lachman Parshad for Rs. 460. I make this sale of my own free will. I have received the whole of the purchase-money in a lump sum. I have declared the said purchaser to be my representative, and put him into possession of the entire property. I have transferred to the said purchaser, from the date of the execution of this document, all rights I possess in respect of the property sold. I have not, nor shall my heirs have, any claim or right to the property sold, or to the purchase-money.” The deed was executed by the vendor only, who presented it for registration on the 19th August 1875, to Mr. J. H. Prinsep, District Judge of Cawnpore and the Registrar of the District, the purchaser not being present. On learning by inquiry from the vendor, that he had not received the purchase-money, the Registrar refused on that ground to register the deed, and also on the ground that the deed had not been delivered.

On the Court (STUART, C.J., and OLDFIELD, J.) calling for the records of the registration proceedings, the Registrar stated that, in refusing to register,

*Miscellaneous Application, No. 7MB. of 1876.

he believed that the vendor was seeking to have registered a document of his own creation, and that the deed could not be registered in the absence of the purchaser. The purchaser denied the contract of sale.

The Court referred to the Full Bench the question whether, under the circumstances, and with reference to the provisions of Act VIII of 1871, the registration of the document should be ordered.

Munshi *Hanuman Parshud* and Munshi *Sukh Ram* for the Petitioner.

Pandit *Bishambar Nath* and Pandit *Nand Lal* for the Opposite Party.

Pandit *Nand Lal*.— The petition cannot be entertained. The right of petitioning against a refusal to register is given by s. 73 of the Registration Act to a party "claiming" under the document.

The petitioner cannot be said to claim under the sale-deed.

[320] Munshi *Sukh Ram* contended that the petitioner was a party "claiming" under the sale-deed. He can claim the purchase-money under it. The Court can therefore entertain the petition.

Stuart, C.J.—It was objected by the respondent that, under s. 73 of the Registration Act, there was no appeal in a case like the present, by which, as I understand, is meant that, inasmuch as the appellant could not be said to "claim" under the document, he had no right to make the present application to this Court, being the remedy provided by s. 76, where the Judge of the district was, as in this case, the registering officer. But I am not satisfied that for the purposes of this section he must be regarded as not claiming under the document. He might not succeed in establishing his claim, say, to the purchase-money, but, although the deed was unilateral and executed by the vendor alone, it appears to be in the form of sale-deed customary in these Provinces, and, on the face of it, therefore, and so far as its form is concerned, and whether it be registrable or not, I do not see that we are obliged at once to assume that it could not be given effect to, or that because it is in form unilateral the appellant could not claim the purchase-money. There is, however, in relation to this point a curious inconsistency in the Act; for, whereas by this s. 73 the party desirous of making an application under it must be a person "claiming" under the document, by s. 32 documents for registration shall be presented "by some person executing or claiming under the same," not executing and claiming, but executing or claiming. Why this should be, and the parties proceeding under these two sections in different positions, it is not easy to understand, unless it was intended that a party against whom an order refusing to register had been made was in a different position, at such a stage of the proceeding, from a party merely executing the document. Be this as it may, I do not see that for the purposes of s. 73 we are bound to assume *in limine* that the applicant did not, or could not claim under it. I therefore consider that he was not precluded from his remedy by the application he has made to this Court.

But on the merits of the question embraced in the reference before us, I must express the opinion I have formed on it, and that is, that registration of the document in question should not be ordered. Even on the assumption that the applicant may be understood to [321] claim under this sale-deed, I am not satisfied that it is a document or instrument within the meaning of the Registration Act. It is not only not executed by the alleged purchaser, but has been repudiated by him altogether, and this is a state of the case which I think

may be allowed to come within the scope and intention of s. 35 of the Act, which provides that, if all or any of the persons by whom the document purports to be executed deny its execution, the registration shall be refused.

Was this so-called sale-deed a legal and enforceable document at all? I think not. As I have remarked, such unilateral instruments are not uncommon in these Provinces, and I may add that, in the practice of Scottish conveyancing, such instruments as sale-deeds, or deeds in the nature of mortgages, and the like, are only signed by the seller or obligor, and no inconvenience is experienced from this where the instrument records a true contract. But when there is no evidence at hand of such a contract, the unilateral character of the instrument leaves it open to the alleged purchaser or obligee to repudiate it. In the case before us the alleged sale-deed recites no previous contract or agreement, the repudiation of it is express, and there is also the serious fact that no consideration had passed upon it. It was suggested at the hearing that there was no limit to the nature or character of the documents which might be presented for registration, but that the registering officer was bound to accept and register all documents without exception which purported to be executed at all. But this is a view of the law which I cannot concur in. If such was the position of the registrars under the Act, the public time would be wasted, and their duties would become intolerable. On the other hand, the consequences of registration are very serious, and I cannot allow that these consequences should be visited on the heads of innocent persons. The registering officers must satisfy themselves by evidence and inquiry that documents are honestly presented in their office, otherwise no one would be safe.

Pearson, J.—The vendee was not a party to the instrument in question, which does not in any way bind him. It was executed by the vendor alone, and merely declares that he has sold the property therein mentioned, for a consideration which he has received, to Lachman [322] Parshad. But no claim could be founded upon it against Lachman Parshad or anyone else. The vendor could not, therefore, as a person claiming under it, apply by petition, under s. 73, Act VIII of 1871, to the High Court, in consequence of the Judge's refusal to register it, with a view to establish his right to have the document registered. His petition cannot be entertained. Whether the Judge was right or wrong in refusing to register it is a question which we are not required to consider and determine.

Turner and Spankie, JJ.—The petitioner having, as he alleges, agreed to sell certain lands and other property to the respondent, executed a conveyance and presented it to the Registrar for registration. That officer refused registration on the grounds that the deed had not been delivered nor the consideration paid. Had the question before us rested here, there would have been little difficulty in disposing of it, as the law does not prescribe either of the grounds recorded by the Registrar as justifying the refusal of registration. The deed was in a form not uncommon, if not most usual, in these Provinces, that is to say, it was unilateral, the seller alone being a party to it. It was duly executed by the seller, who appeared before the Registrar and admitted its execution. It is not alleged, and it does not appear that there had been any failure to comply with the requirements of the law, consequently registration should not have been refused. But it is contended on the part of the respondent that the petitioner is not entitled to apply to this Court for an order for the registration of the instrument, seeing that the law accords that privilege only to a person claiming under such instrument, or his representative, and that on the face of the instrument it appears that the petitioner does not claim under it. The only

claim which it is suggested the petitioner could assert would be a claim to the purchase-money, but inasmuch as the instrument purports to be and is executed by the petitioner alone, it is clear that he cannot claim the purchase-money under it. It would not be the duty of the Court, we apprehend, on such an application to enter into any involved question of construction to determine whether or not the person presenting such an application has not a claim, but when, on the face of the document, it clearly appears that he can claim nothing under it, we hold that a mere unfounded assertion of a claim will not give him a *locus standi*, and that his application should be refused.

[323] Oldfield, J.—All documents to which the Registration Act applies may be presented for registration by some person executing or claiming under the same (s. 32), and it is the duty of the registering officer, on presentation of the document, to inquire (a) whether or not such document was executed by the persons by whom it purports to have been executed, (b) satisfy himself as to the identity of the persons appearing before him, and alleging that they have executed the document, and (c) in the case of any person appearing as a representative, assign or agent, satisfy himself of the right of such person so to appear (s. 34), and, if satisfied on these points, it is his duty to register it (s. 35). In the present case the Judge should have ordered registration, as the above conditions were satisfied.

By s. 76 an appeal lies to this Court from the Registrar's order refusing registration, on the application of any person claiming under the document, or his representative, assign or agent, in order to establish his right to have the document registered, and the Court's duty is to order registration if it finds that the document has been executed, and the requirements of the law have been satisfied (s. 76).

It is, however, argued that the petitioner in the present case cannot appeal, for though he executed the document, he is not claiming under it, since it is a document which can support no claim. The document purports to effect a sale of certain lands on the part of the petitioner to Lachman Parshad. As such, it is certainly one of those documents capable of registration, and to which the law applies as purporting or operating to create, declare, or assign, an interest in immoveable property; it is a document which the Registrar should register on application by the petitioner. No doubt the deed is signed by the vendor only as executor, but I do not think we can look into the document and say, that since it is unilateral it can give to the petitioner no valid claim, and therefore he has no *locus standi* to appeal; the document by itself may make no complete contract, but it may go to form one; for it is possible that another forming the counterpart may have been executed completing the contract, and so we cannot say that petitioner may not be in a position to assert a claim under it as **[324]** forming part of a contract. In entering on these questions, I think we go beyond the powers given by the Act, which confines the inquiry to the question of the right to have the document registered, dependent on due execution and fulfilment of the requirements of the law. Documents of this character are not uncommon, and our refusal to allow the appeal, and order registration of such documents, may have prejudicial effects. I would admit the appeal, and order the Registrar to register the document.

Petition refused.

NOTES.

[For a contrary view see (1904) P. R. 18; see also 18 Mad. 255; 24 Cal. 668.]

[1 All. 824]

APPELLATE CIVIL.

The 16th December, 1876.

PRESENT:

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR. JUSTICE PEARSON.

Ilahi Baksh and others.....Defendants

versus

Imam Baksh and others.....Plaintiffs.*

Act VIII of 1859, ss. 7, 97—Omission of part of claim—Withdrawal of suit—Institution of fresh suit, including part of claim omitted.

Where the plaintiffs in a suit were permitted to withdraw from the same, with a view to bringing a fresh suit which should include a portion which had been omitted of the claim arising out of the cause of action, and such fresh suit was brought, the additional portion of the claim in that suit was not barred by s. 7 of Act VIII of 1859.

THE plaintiffs in the present suit brought a suit on the 1st September 1875, to be maintained in possession as theretofore of a plot of land, alleging as their cause of action that the defendants had, on the 2nd June 1875, prohibited them from watering the trees thereon. On the 8th November the plaintiffs applied for permission to withdraw from the suit, with liberty to bring a fresh suit. This application did not contain the grounds upon which the plaintiff's applied for such permission. The Court of First Instance granted such permission without recording any reason for granting the same, on payment of certain costs. On the 18th December the plaintiffs brought the present suit in which they claimed on the same cause of action to be maintained in possession of three plots of land. The Court of First Instance gave them a decree, which was affirmed on appeal by the defendants.

[325] On special appeal by the defendants to the High Court, it was contended that the claim to the additional plots of land was barred by s. 7, Act VIII of 1859.

Lala Lalta Parshad and Babu Baroda Parshad for the Appellants.

Pandit Ajudhia Nath and Pandit Nand Lal for the Respondents.

The Judgment of the High Court, so far as it related to this contention, was as follows:—

As to the first plea, it would seem that the reason for which the former suit was withdrawn was that a fresh suit might be brought which should include a portion which had been omitted before of the claim arising out of the cause of action, and the permission to bring the new suit must be reckoned to be permission to supply the former omission. This being so, we are of opinion that the additional portion of the claim in this suit is not barred by s. 7,

* Special Appeal, No. 1012 of 1876, against a decree of Shankar Das, Subordinate Judge of Sharapur, dated the 7th July 1876, affirming a decree of Ahmad Hasan, Munsif of Deoband, dated the 9th May 1876.

Act VIII of 1859. A similar view was taken in special appeal case No. 180 of 1876, decided by a Bench of this Court on the 28th April last.*

NOTES.

[See (1894) 17 All. 53 ; (1900) 14 C. P. L. R. 105.]

[1 All. 326]

PRIVY COUNCIL.

The 3rd and 4th November, 1876.

PRESENT :

SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, AND SIR ROBERT P.
COLLIER.

Narain Singh and others.....Plaintiffs

versus

Shimbhoo Singh and others.....Defendants.

(On appeal from the High Court of Judicature, North-Western Provinces.)

First and Second Mortgages—Dispossession of Second Mortgage—Cause of action—Limitation—Interest.

Z, being indebted to A, executed in his favour a written mortgage of certain lands, in which it was agreed that if the debt was not repaid within a fixed time, A should be put into possession of the lands. Subsequently Z executed in favour of [326] P, to whom also he owed money, a second mortgage of the same lands subject to the same condition. P not receiving payment within the stipulated time, sued Z on the mortgage and obtained a decree for possession of lands, under which he was put into possession in the year 1846. After P had obtained his decree A, whose debt had likewise remained unpaid, brought a suit as first mortgagee against Z and P for the possession of the lands, and obtaining a decree, recovered possession in the year 1874, dispossessing P. In the year 1870, the heirs of Z having paid off the debt due to A, resumed possession, whereupon the heirs of P applied to be restored to possession in execution of the decree obtained by P in 1845. This application having been rejected on the ground that that decree had been fully executed when P obtained possession under it, the heirs of P instituted a suit against the heirs of Z to recover possession and for interest during the time they were dispossessed.

Held by their Lordships of the Judicial Committee, reversing the decision of the High Court, that the heirs of P were entitled to possession on A's mortgage being paid off, and that their cause of action accrued and limitation ran against them from the time when the heirs of Z resumed possession.

* In that case the application for permission to withdraw the former suit was based on the ground that a portion of the claim arising out of the cause of action had by mistake been omitted to be included in the plaint with which that suit had been commenced, and on that ground permission for the withdrawal of the suit and to bring a fresh suit was accorded. Under these circumstances the Court (PEARSON and SPANKIE, JJ.) was of opinion that it would not be fair or reasonable to hold that the aforesaid portion of the claim could not be entertained in the fresh suit, although it might be true that the defect in the former plaint might have been amended without recourse to the provisions of s. 97 of Act VIII of 1859.

Held, also, that they were not entitled to a decree for the interest accruing during the time they were dispossessed.

THIS was an appeal from a decree of a Division Bench of the High Court at Allahabad, dated the 13th May 1873, reversing the decree of the Subordinate Judge of Aligarh, dated the 23rd November 1872 (*See H. C. R., N.-W. P., 1873, p. 153.*)

Mr. Doyne appeared for the Appellants, who were the plaintiffs in the original Court.

Mr. Joseph Graham appeared for the Respondents.

The facts of the case and the questions arising for determination on the appeal are fully stated in their Lordships' judgment, which was delivered by

Sir Barnes Peacock.—In this case the plaintiffs, as sons and heirs of Pohoop Singh, a mortgagee, seek to recover possession of 20 biswas of the zemindari right of mauza Lallpoor. The defendants in the suit are the representatives of the mortgagor. The plaintiffs state that they claim to establish their right as mortgagees in virtue of their title as heirs of their defunct father, Pohoop Singh, "in that, under a mortgage-deed, dated Phagoon Badi 7th Sumbat 1896, Pohoop Singh, the ancestor of the plaintiffs, having obtained a decree from the Sudder Ameen's [327] Court, was put in possession on the 31st August 1846." Most of the defendants admit the claim, but the defendants Man Singh, Shimbhoo, Girdharee, and Motee, put in an answer, by the second paragraph of which they admitted that under the former decree the plaintiffs' ancestor was in possession for upwards of a year; but they set up in the fourth paragraph of the same written statement, that "the mortgage alleged by the plaintiffs is wholly unfounded. The defendants' ancestor did not receive the mortgage-money from the ancestor of the plaintiffs; and Pohoop Singh, the ancestor of the plaintiffs, was a person notorious for his expertness in court affairs. He had with a view to deprive Asaram and Sheo Lall of their mortgage-money, obtained by deception a decree on the mortgage-deed in suit, and the defendants' father had, according to the Shasters, no right to transfer and waste the defendants' ancestral property without any legal necessity to satisfy illegal demands. Hence, under the Shasters also, the mortgage alleged by the plaintiffs is invalid, and the claim is unjust."

Now, having admitted that the plaintiffs did obtain possession by virtue of a decree, and that he remained in possession for a year, the defendants also, in the same written statement, alleged that the mortgage was collusive and a *benami* transaction. But although the written statement must be taken altogether, it does not necessarily follow that the whole of the defendants' statement is to be taken as proved in their favour, if they offer no evidence whatever in respect of the allegation that the mortgage was a fraudulent transaction.

It appears, then, that the plaintiffs' ancestor did get into possession on the 31st August 1846. In 1847 he was dispossessed in a suit which was brought against him by the first mortgagees, Asaram and Sheo Lall. He was then turned out of possession, and remained out of possession from 1847 down to the year 1870. The precise terms of the mortgage-deed do not appear, but, as far as can be collected, it was a mortgage-bond, by which it was stipulated that in the event of the non-payment of the mortgage-debt within five years,

the mortgagors would cause a mutation of names and the plaintiffs be put into possession.

[328] It appears that the plaintiffs' ancestor did get possession under that document, and it appears to their Lordships that the decree obtained upon that document gave the plaintiffs, as mortgagees, a title to the land as against the defendants, but it gave them no title as against the prior mortgagees, Asaram and Sheo Lall. When Asaram and Sheo Lall turned the plaintiffs' ancestor out of possession, it did not destroy his title and right to the land. It may have given him a right of action as against the mortgagors for having mortgaged to him when they had previously mortgaged to Asaram and Sheo Lall, but it did not destroy the right which the plaintiffs obtained against the defendants by virtue of the mortgage and of the judgment which they had obtained upon it.

The first Court laid down certain issues : first, whether the original mortgagors executed the mortgage-deed in respect of the property in suit on receiving the full mortgage-consideration, or whether it was collusively secured without payment of any mortgage-consideration, and whether the mortgage-deed could take effect against the defendants according to the Hindu Law. The Judge says in his judgment—"It is apparent that plaintiffs' predecessor on the former occasion obtained a decree for possession on proving the mortgage-deed, and the payment of mortgage-consideration ; and the fact of the decree having been made is admitted by defendants. Again, all the defendants, excepting four, two of whom have made no defence, confess the claim, which is further supported by the evidence of Maulvi Inayat Ali, pleader, Chuni Lall, patwari, and two other persons, both named Hulasi, witnesses for plaintiffs. The plea urged by defendants must therefore be over-ruled ; and they have failed to refute the claim." He therefore gave a decree in favour of the plaintiffs.

Upon that an appeal was preferred by Shimbhoo alone to the High Court ; and one of his grounds of appeal is that there was "no cause of action and foundation for the plaintiffs' suit ; neither the deed of mortgage nor the decree has been produced ; the conditions agreed upon between the parties cannot be ascertained." The High Court, having heard the case argued, gave judgment and reversed the decision of the first Court. They say that "the High Court's order of the 1st April 1872 could not give any legitimate cause of action.* Nor did any right of action accrue to the plaintiffs by reason of the satisfaction of the debt of Asaram and Sheo Lall and the recovery of possession of the estate by the mortgagors or their heirs." It appears to their Lordships that there was a mistake on the part of the High Court in holding that no cause of action accrued to the plaintiffs by reason of the satisfaction of the debt of Asaram and Sheo Lall, and the recovery of possession of the estate by the mortgagors or their heirs. It appears to their Lordships that when the first mortgage was paid off in 1870, the title of the plaintiffs, which had all along been a good title as against the mortgagors, was a valid title as against every one. Then, when their title became a valid and a good title, the mortgagors had no right to enter upon the possession of their land. But the mortgagors did enter into possession of it and keep the possession from the plaintiffs ; and it appears to their Lordships

*Before bringing their suit the plaintiffs had endeavoured to recover possession of the land by applying for execution of the decree obtained by Pohoop Singh in 1846. The "High Court's order of the 1st April 1872," here referred to, rejected that application on the ground that Pohoop Singh's decree had been fully executed when, in 1846, he was put in possession of the land.

that, having the right and title to the land when the first mortgage was paid off, the entry of the mortgagors upon that land to which the plaintiffs had obtained a right under the second mortgage, gave them a cause of action against the mortgagors, the defendants. The Court proceed : "The right of the plaintiffs or their forefather to possession was created by the mortgage-deed of 1840, and was capable of being legally enforced within a period of twelve years. It was the subject of a former suit and of a decree which was fully executed." So it was ; but then that decree gave the plaintiffs a title. The High Court proceeded : "The dispossession of Pohoop Singh after the execution of that decree was not an illegal proceeding." It is true it was not an illegal proceeding because he was dispossessed by persons who had better title, namely, the first mortgagees. The Court go on : "Although he was thereby deprived of the right he had obtained, [330] he had a remedy, of which he might have availed himself, by suing within the proper period for the recovery of the money lent by him to the mortgagors. The present suit is clearly inadmissible and cannot be decreed even against the confessing defendants."

The High Court held that the plaintiffs' suit was barred by limitation.

It appears, however, to their Lordships, that the plaintiffs having a good title when the first mortgagees were paid off in 1870, their cause of action accrued when the defendants after that period entered into possession of the estate to which they had no title. It appears, therefore, to their Lordships, that there was an error in the decision of the High Court, so far as it regards the question of limitation.

But it is said that there was no sufficient evidence that the decree had been obtained by Pohoop Singh, the plaintiffs' ancestor. In the first place, as already stated, the written statement of the defendants admits that there was that former decree. They say that "under the former decree, the plaintiffs' ancestor was in possessor for upwards of a year" and then he was turned out by the first mortgagees. Again, when Asaram and Sheo Lall, the first mortgagees, brought an action against the second mortgagee, Partab Singh, the ancestor of the plaintiffs, and Lulloo and others, the zamindars, the mortgagors, were also made parties to that suit. And in that suit, it appears that the decree of Partab Singh against the zamindars was in evidence. The Sudder Court says :— "The plaintiffs sued Lulloo and others, zamindars of the above-named village, for possession on a mortgage-bond, dated the 18th Kower 1859 Sunbat ; but in consequence of their having omitted to specify the nature of the tenure, they were non-suited. Pohoop Singh also sued the zamindars on a mortgage-bond and obtained a decree which was upheld in appeal." There was a finding then in that case that Pohoop Singh did sue the zamindars on the mortgage-bond and that he obtained a decree against them. Further when the first mortgage had been paid off and the plaintiffs had [331] been dispossessed by the mortgagors, they attempted to execute a second time the decree which their ancestor had obtained against the mortgagors, and they applied to the Court for an execution of the decree. The Munsif decided that they were entitled to have an execution. In that suit Simbhoo, who is the present defendant, was one of the parties, and in that case the judgment was produced. The Munsif says :— "The record of the case having been brought forward, it appears that the objection of the defendants, judgment-debtors," that is, Simbhoo, one of the present defendants, "is that Pohoop Singh, the original decree-holder, and deceased ancestor of the plaintiffs, had been put in possession by the Court after the passing of the decree." It appears,

therefore, to their Lordships, that there is sufficient evidence in the cause to justify the first Court in coming to the conclusion that the plaintiffs were mortgagees, and that they obtained possession under a decree founded upon that mortgage.

The judgment of the High Court being erroneous, it becomes necessary to consider whether the decision of the first Court can be maintained to the full extent.

Now the claim made in the plaint is "to recover possession as mortgagees over the entire 20 biswas zamindari right of mauza Lallpoor, pargana Goree, within the jurisdiction of the Iglass Tahsili, valued at Rs. 5,000,"—the valuation is not a matter of importance,—"the principal amount of the mortgage-loan, and to recover Rs. 6,999-15-0 interest thereon during the period of the mortgagee's dispossession, as per detail given below, aggregating Rs. 11,999." Now the plaintiffs, although they were turned out of the land, might have sued for the interest. All that they are entitled to, as it appears to their Lordships, is to recover possession of the land; and when they have got possession of the land, if the mortgagors apply to redeem, the question will be—how much is due to the plaintiffs as mortgagees under their mortgage, and how much they are entitled to receive before the mortgagors can redeem? The Judge of the first Court appears to have given them a decree not only for possession of the land, but also for 6,999 rupees interest in addition to the possession of the land. His judgment is not very clear, but it is necessary to make the point perfectly clear as to [382] what the judgment ought to be. He says:—"Claim to recover possession as mortgagees over the entire 20 biswas zamindari right in mauza Lallpoor, pargana Goree, valued at Rs. 5,000, principal of the mortgage-loan, and Rs. 6,999-15-0 interest on the mortgage-amount." Then he says:—"Ordered that plaintiffs' claim be decreed with costs against the defendants, that the pleaders get their fees." Then he says:—"Subject-matter of decree. Recovery of possession as mortgagees over the entire 20 biswas right in mauza Lallpoor, pargana Goree, valued at Rs. 5,000, the principal amount of the mortgage-loan, and of Rs. 6,999-15-0 interest on the mortgage-amount for the period of the plaintiffs' dispossession : total Rs. 11,999-15-0." If by that decree the lower Court intended to give the plaintiffs a decree not only for recovery of the possession of the land, but also to recover Rs. 6,999 in money as interest, it appears to their Lordships that that judgment, so far as giving a decree for the money as interest is concerned, was erroneous.

Their Lordships therefore think that the decision of the High Court ought to be reversed, and that the decision of the first Court should be modified by confining the recovery of the plaintiffs merely to the possession of the land. In that case, the plaintiffs having got possession of the land, the question, as before observed, will remain open until the defendants seek to redeem the land. Then the question will arise—how much is due to the plaintiffs as the second mortgagees, and for what amount they are entitled to hold possession of the land under their mortgage?

Their Lordships, therefore, upon the whole, will humbly recommend Her Majesty to reverse the decree of the High Court, and to affirm the decision of the lower Court, so far only as it decrees possession to the plaintiffs of the land sought to be recovered in the suit. Their Lordships are also of opinion that the appellants are entitled to the costs of this appeal.

Agent for the Appellants : Mrs. T. L. Wilson.

Agents for the Respondents : Messrs. Oehme and Summerhays.

NOTES.

[See (1894) P. R. 83 : (1899) 4 O. C. 171 ; 2 O. C. 145. The right of mortgage to subsequent possession may be lost by his waiver :—(1879) 5 C. L. R. 227.]

[383] FULL BENCH.

The 21st December, 1876.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, MR. JUSTICE SPANKIE AND
MR. JUSTICE OLDFIELD.

Ram Kishan.....Plaintiff

versus

Bhawani Das.....Defendant.*

Sale in execution—Right of attaching creditor to sale-proceeds—Suit for money received by the defendant for the plaintiff's use—Limitation—Act VIII of 1859, s. 270—Act XI of 1871 (Limitation Act), sch. ii, cls. 15, 26, 60†, 118.

Certain immoveable property was attached in execution of a money-decree held by A, dated the 22nd August 1871, on the 1st April 1872. The same property was subsequently attached in execution of a decree held by B, dated the 19th August 1871, which directed the sale of the property in satisfaction of a charge declared thereby. The property was sold in execution of this decree. The Munsif directed that the proceeds of the sale should be paid to B. A, who claimed them on the ground that he had first attached the property, appealed against this order. The Judge, declaring that A was entitled to the proceeds, reversed the Munsif's order. A then obtained an order from the Munsif directing B to refund the money, which he did, and it was paid to A. B sued A to recover the money by establishment of his prior right to the same, and for the cancellation of the Judge's order, alleging that the same was made without jurisdiction.

* Special Appeal, No. 1226 of 1875, from a decree of Maulvi Hamid Hasan Khan, Subordinate Judge of Mainpuri, dated the 23rd September 1875, reversing a decree of Muhammad Nizam Ali Khan, Munsif of Etah, dated the 5th April 1875.

† Art. 60 :—

Description of suit.	Period of limitation.	Time when period begins to run.
For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.	Three years	... When the money is received.]

Held (by a majority of the Full Bench), that the suit was one for money received by the defendant for the plaintiff's use, and was therefore governed by cl. 60, sch. ii of the Limitation Act.

Per STUART, C.J., SPANKIE, J.—That the suit was not such a suit, but was one for which no period of limitation was provided elsewhere than in cl. 118 of the schedule, and that it was, therefore, governed by that clause.

Held, by the Division Bench that *A* was not entitled, as the first attaching creditor, to the sale-proceeds.

THE plaintiff in this suit claimed to recover from Bhawani Das, defendant, certain money, being the part proceeds of a sale in execution of decree, by the establishment of his prior right to the same, and to render ineffectual a miscellaneous order made by the Judge of Mainpuri in another suit, dated the 7th November 1872. He alleged that the defendant had illegally realized the proceeds from him under the said order, which was made without jurisdiction. On the 12th March 1867, Ram Singh, defendant [334] in the two suits instituted by the present plaintiff and defendant, gave the plaintiff a bond for the payment of money in which he charged certain immoveable property with such payment. The plaintiff obtained a decree on this bond on the 19th August 1871, which directed that the property should be sold in satisfaction of the charge. Bhawani Das, who had obtained a money-decree against Ram Singh on the 22nd August 1871, caused the property to be attached in execution of his decree on the 1st April 1872. The plaintiff subsequently caused the property to be attached in execution of his decree. The property was sold in execution of the plaintiff's decree on the 20th July 1872. Bhawani Das claimed the whole of the sale proceeds on the ground that he had first attached the property. The Munsif ordered that the plaintiff's decree should be satisfied out of the sale-proceeds and the balance paid to Bhawani Das. On appeal by Bhawani Das, the Judge of Mainpuri, on the 7th November 1872, declared that he was entitled to the whole of the proceeds, and reversed the Munsif's order. Bhawani Das then obtained an order from the Munsif directing the plaintiff to refund the money, which he did, and it was paid to Bhawani Das on the 26th March 1873.

In the present suit, Bhawani Das, defendant, contended in the Court of First Instance that the suit was barred by limitation. The Court of First Instance held that the suit was brought within time, and being of opinion that the plaintiff was entitled to recover the money in suit, gave him a decree for the same. The lower Appellate Court also held that the suit was not barred by limitation, but being of opinion that the defendant was first entitled to be paid out of the sale-proceeds, by reason of his having first attached the property, it dismissed the plaintiff's suit.

On special appeal by the plaintiff to the High Court, it was contended by him that as the sale was ordered in execution of his decree to satisfy a charge declared by the decree, the defendant, the holder of a money-decree only, was not entitled to be first paid out of the sale-proceeds by reason of prior attachment.

The Court (PEARSON and SPANKIE, J.J.) referred the case to a Full Bench, the order of reference being as follows :—

[335] The ground of appeal is valid and is supported by two precedents which have been brought to our notice (S. A., No. 228 of 1875, decided the 18th May 1875, and S. A., No. 601 of 1875, decided the 18th August 1875). But

it is contended on the part of the respondent that the suit is barred by cl. 26*, sch. ii, Act IX of 1871. We refer to a Full Bench the question whether that clause is applicable to the present suit, or, if not, which clause of that schedule is applicable.

Munshi *Hanuman Parshad* for the Appellant.

Pandit *Ajudhia Nath* and Munshi *Ram Parshad* for Bhawani Das, Respondent.

Pearson, Turner, and Oldfield, JJ., concurred in the following Opinion :—

To determine what period of limitation is applicable to a suit we must look to the nature of the relief sought. In the case before us, the principal relief sought is the recovery of the money. Although the plaintiff claims the cancellation of the Judge's order and the declaration of plaintiff's prior right, these claims are subsidiary to the principal relief sought, and, indeed, since it is alleged in the plaint that the order impugned was not passed by a competent Court, it was unnecessary for the plaintiff to claim that it should be cancelled. Cl. 15†, sch. ii of the Limitation Act is clearly inapplicable, for that clause refers to suits brought to cancel the orders of competent Courts, it being declared that limitation runs from the date of the final order of a Court competent to pass the order.

If the Judge's order was passed by a Court which was not competent to pass it, the plaintiff is entitled to rely on the order of the Munsif as the only valid order, and in virtue of that order to contend that the money was wrongfully taken by the defendant. We do not say that the plaintiff may not be required to prove that the Munsif's order was right, that he was entitled to the priority which that order recognized. This must depend on the defence set up to his claim. Looking to the substantial relief sought, it appears to us that this suit must be regarded as a suit for money had and received to the plaintiff's use. It is then governed by cl. 60 of the schedule to the Limitation Act. If it is not a suit for money had and received to the plaintiff's use, then it falls under cl. 118‡ of the schedule, and in either case it has been brought within time.

* [Art : 26—

For taking or damaging moveable property.	One year	When the taking or damage occurs.]
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† [Art : 15—

To alter or set aside a decision or order of a Civil Court in any proceeding other than a suit.	One year	The date of the final decision or order in the case by a Court competent to determine it finally.]
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‡ [Art : 118—

Description of suit.	Period of limitation.	Time when period begins to run.
Suit for which no period of limitation is provided elsewhere in this schedule.	Six years . . .	When the right to sue accrues.]

[336] Spankie, J.—The claim was to get back a sum of money which the defendant had unlawfully and illegally realized from the plaintiff under an illegal and improper order of the Judge passed in appeal on the miscellaneous side. The Judge had no jurisdiction in the matter, there being no appeal, and the plaintiff seeks to have the order nullified. The suit is based on the plaintiff's preferential right to recover the money, being the proceeds of an auction-sale, he holding a decree which gave him a lien over the property, and which ordered its sale in satisfaction of the decree. In satisfaction of the decree, the property was sold in due course and the entire decretal amount was made over to the plaintiff by the Munsif, who rejected the claim of the defendant, a third party, to be paid the sale-proceeds. The defendant appealed (there being no appeal), and the Judge reversed the Munsif's order, declaring defendant entitled to the amount. The defendant then obtained an order from the Munsif, directing plaintiff to refund the sale-proceeds that he had received, and plaintiff did so, and defendant realized the money. Such is a brief abstract of the plaint, and it will be seen that the suit is really one for a declaration of the plaintiff's preferential right to the sale-proceeds as against the defendant, who also claims them, to have the Judge's order declared a nullity, and to get a refund of the money paid in consequence of that order from the defendant.

It was contended by respondent before the Division Bench that cl. 26, sch. ii, Act IX of 1871, bars the suit. We are asked whether that clause is applicable to the suit, or if not applicable, what clause is so.

In my opinion cl. 26, for taking or damaging moveable property, does not apply to the suit. There is nothing in the claim which could be brought under this clause of sch. ii. Nor is the plaintiff claiming any damages.

I was disposed to consider that cl. 15 might apply. But on fuller consideration, I do not think it is applicable. A suit under this clause is brought to alter or set aside a decision or order of the Civil Court in any proceeding other than a suit, where the Court was competent to determine it finally. The Court therefore must **[337]** have Jurisdiction, which the Judge had not * when he reversed the Munsif's order giving the sale-proceeds to the plaintiff. The order therefore is of itself a nullity and could have no effect. But even if the judge had had jurisdiction, I am doubtful whether the clause would have applied, as the plaintiff asks for something more than the reversal, or, as he calls it, the nullification of the order. It has been suggested that cl. 60 applied; that this is a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. But I am unable to accept this view. The money was not in the first instance received by the defendant for the plaintiff. It was the plaintiff who had received it and who was compelled under legal process to refund the money. It was not the Judge who actually compelled the plaintiff to refund the money. It was the Munsif who directed the plaintiff to bring back the money to Court, and it is the Munsif's order that the plaintiff should have sued to set aside on the ground that the Judge had no jurisdiction to reverse the first order of the Munsif, and therefore the Munsif's second order could not be maintained. Both plaintiff and defendant

* It has been held in the following cases that where there are rival decree-holders against the same judgment-debtor, not being parties to the same suit, an appeal will not lie by one of such rival decree-holders against an order relating to the distribution of the proceeds of the sale of the property of the judgment-debtor :—*Misree Kowur v. Maharaj Buksh Singh*, Marsh. 597; *Hurish Chunder Sircar v. Azinooddeen Shaha*, W.R., 1862-1864, p. 181; *Jungee v. Burjo Behari Singh*, 2 W. R., Misc. 21; *Afzuloomisa Begum v. Parbatty Koonwar*, 2 W. R., Misc. 42; *Choonee Lal v. Puttoo Bhukut*, 6 W.R., Misc. 74; and *Gogaram v. Kartick Chunder Singh*, B. L. R., Sup. Vol. 1028; s. c., 9 W. R., 515.

claimed the sale-proceeds as their own, one by virtue of his decree which maintained his lien on the hypothecated property ordered for sale, and the other by virtue of his prior attachment of the property sold. When defendant obtained them in consequence of the Judge entertaining an appeal to hear which he had no jurisdiction, the defendant received the money after it had been paid back into Court from the Munsif's Court for his own use, and not as belonging to the plaintiff, or to be held by defendant to his use. The plaintiff may be legally entitled to the sale-proceeds, but I do not think that it can be said that the defendant received the money under circumstances which render the receipt of it a receipt to the use of the plaintiff. Even more, the plaintiff does not ask for the money on the ground of its having been so received by defendant, [338] but he prays the Court to declare his preferential right as against defendant to recover the sale-proceeds ; to nullify the Judge's order which led to his being compelled to refund the money into the Munsif's Court, and to have a decree given to him for the money against the defendant. I think with reference to the circumstances of this case that cl. 60 does not apply, and as I do not find any period of limitation provided for a suit of the nature of the one now before us, it falls within the terms of cl. 118 of the schedule, and six years would be the limitation from the time when the right to sue accrued.

Stuart, C. J.—I am of the same opinion as that which Mr. Justice SPANKIE has given, although not without hesitation. I am clear that articles 15, 26, and 60 do not apply, and there being apparently no other provision of the Limitation Act expressly applicable, the general law provided by article 118 appears to afford the only solution of the question referred to us.

Appeal allowed.

NOTES.

[Where it is necessary to set aside the order before relief could be given, the residuary Article does not apply : (1886) 13 Cal. 159.

Art. 62 applies to one co-mortgagor suing for his share :—(1905) 32 Cal. 527 ; *see also*, (1879) 2 All. 354.]

[1 All. 338]
FULL BENCH.

The 11th January, 1877.

PRESENT :

SIR ROBERT STUART, Kt., CHIEF JUSTICE, MR. JUSTICE PEARSON,
 MR. JUSTICE TURNER, MR. JUSTICE SPANKIE, AND
 MR. JUSTICE OLDFIELD.

Abdul Aziz and another.....(Plaintiffs) Appellants
versus
 Walikhan.....(Defendant), Respondent.*

Lease of Zamindari Rights—Wrongful dispossessio[n] of lessee by lessor—Suit for Compensation—Civil Court—Revenue Court—Jurisdiction—Act XVIII of 1873 (N.- W. P. Rent Act, s. 95, cl. (m)).

A granted *B* a lease of his zamindari rights in certain villages for a term of years at a fixed annual rent. Two years before the term expired, in breach of the conditions of the lease, he dispossessed *B*, and thereafter made collections of rent from the agricultural tenants himself. *B* sued him in the Civil Court to recover the moneys so collected by him in those two years. Held (by a majority of the Full Bench) that the Courts of Revenue were open to *B*, and that, as he could obtain in such a Court the relief he sought in the suit by an application for compensation for wrongful dispossession, the Civil Courts could not, under cl. (m), s. 95 of Act XVIII of 1873, take cognizance of the suit.

Per STUART C.J., and SPANKIE, J.—That as the matter was not one on which *B* could make an application to a Revenue Court of the nature mentioned in cl. (m), s. 95 of Act XVIII of 1873, the suit was properly instituted in the Civil Court.

[339] The plaint in this suit stated that the plaintiffs claimed to recover from the defendant certain moneys, which were illegally collected by the defendant in 1280 and 1281 Fasli, from certain villages leased to the plaintiffs by the defendant, after the lease (*kathina*) was in operation, and contrary to the conditions of the same, and which moneys the defendant had appropriated; and that the cause of action in respect of the money collected in 1280 Fasli arose on the 1st Asadh 1281 Fasli (1st June 1874), and in respect of that collected in 1281 Fasli on the 1st Asadh 1282 Fasli (20th June 1875). Under the lease which was dated the 8th June 1869, the defendant granted the plaintiffs for a term of five years his zamindari rights in the villages at a fixed annual rent. Two years before the expiry of this lease the defendant dispossessed the plaintiff of the villages, and made collections of rent from the tenants himself.

The Court of First Instance and the lower Court of appeal agreed in holding that the suit was one for compensation for wrongful dispossession, as described in cl. (m), s. 95 of Act XVIII of 1873, and was therefore under that section cognizable only by a Court of Revenue.

* Special Appeal, No. 311 of 1876, from a decree of G. P. Money, Esq., Judge of Baroily, dated the 25th November 1875, affirming a decree of Rai Bakhtawar Singh, Subordinate Judge, dated the 17th March 1875.

On special appeal by the plaintiffs to the High Court it was contended by them that the suit was virtually one for money received by the defendant for the use of the plaintiffs, and was therefore cognizable by the Civil Courts.

The Court (PEARSON AND SPANKIE, JJ.,) referred the case to a Full Bench, the order of reference being as follows :—

We refer to the Full Bench the question whether, as ruled by the lower Courts, they are precluded from taking cognizance of this suit by the provisions of s. 95, Act XVIII of 1873, with reference to cl. (m); or whether, as contend-ed by the appellants, the suit being not one for compensation for wrongful dispossessio-n, but for the recovery of money improperly received and wrongfully detained by the defendant (respondent), and in the eye of the law had and received by him for their use, is cognizable by the Civil Courts.

Mr. Leach, for the Appellants.

[340] *Pandit Bishambhar Nath and Mir Zahur Husain* for the Respondent.

Stuart, C.J.—I am clear that both the lower Courts are wrong, and that the suit is not one of the kind described in cl. (m) of s. 95 of Act XVIII of 1873. The lease given by the defendant to the plaintiffs was not merely an agricultural one, and did not simply establish the relation of landlord and tenant, but within its limits constituted an independent and indefeasible title and right which the defendant invaded. The defendant is therefore answerable to the plaintiffs in damages, the measure of which materially is the money improperly received and wrongfully detained by him, the defendant, and such a claim is alone cognizable by the Civil Courts.

Pearson, Turner, and Oldfield, JJ., concurred in the following Opinion:—

The appellants took a lease of several villages from the respondents, and they allege that, after the lease had been acted upon the respondent in breach of the conditions of the lease collected the rents and profits which in virtue of the lease appertained to the appellants, and they have instituted the present suit to recover the sums actually collected. The respondent pleaded that the claim was virtually one for damages for wrongful dispossessio-n, and therefore could not form the subject of an application in the Revenue Court. To this the appellants have replied that the Rent Act does not apply to persons who in these Provinces are known as thikadars or katkinadars, and in the old Regulations and Acts are denominated under-tenants, persons who take from the zamindars lease of their zamindari rights in lands.

Although no express mention of this class under any of the particular designations by which they are ordinarily known may be found in the Rent Act, when their position in relation to the lessors is regarded they are unquestionably tenants, and they are not deprived of this character because in relation to the actual cultivators of the whole or some parts of the property leased they may be described as landlords. They hold an intermediate estate in the property leased which the proprietors have as it were carved out of [341] their own estate; they hold the property leased under the proprietors; the payments they make to the proprietors are rent, and fall within the definition of that term in the Rent Act; and therefore, although all the sections of the Rent Act may not apply to such lessees, but some are restricted in their operation to particular classes of tenants, the persons whose position we are considering are not the less subject to those provisions of the Act which apply to tenants of

all classes. Before the last Rent Act was passed it was not doubted that the class of thikadars was competent to sue and liable to suit in the Revenue Courts ; and inasmuch as the intention of the framers of the Rent Act was to extend rather than curtail the jurisdiction of the Revenue Courts, the presumption favours the construction that the general provisions of the Rent Act apply to this equally with all other classes of tenants, save those who by the proviso to the first section are excluded from the operation of the Act.

There remains then the question raised by the respondent's plea that the Civil Courts are not competent to entertain the suit by reason of the provisions of s. 95 of the Rent Act. Although the suit is brought not to obtain damages for illegal dispossessio[n], but to recover moneys which the appellants allege were payable to them under their lease, and which have been wrongfully collected by the respondent in breach of the provisions of the lease, it is clear that on an application for compensation for wrongful dispossessio[n] it would be incumbent on the Revenue Court to award compensation for wrongful collections actually made, as well as for the other profits which the lessees might have enjoyed had their possession not been disturbed ; and it is also clear that by making collections in breach of the lease, the respondent disturbed the possession of the lessees. The 95th section of the Act prohibits Courts other than the Revenue Courts from taking cognizance of any dispute or matter on which an application of the nature mentioned in that section might be made. One of the applications mentioned in that section is an application for compensation for wrongful dispossessio[n], and inasmuch as under such an application the appellants could obtain what they now claim, it must be held that the jurisdiction of the Civil Courts is ousted, and that the appellants can obtain relief only in the Revenue Court.

[342] Spankie, J.—I cannot think that the provisions of cl. (m), s. 95 of Act XVIII of 1873, are applicable to the case referred to us. I regard the clause as applying to the ordinary tenant or agricultural ryot paying rent for the use or occupation of land, and not to the lessee of an entire estate for a fixed term of years as the plaintiff is, or rather was, in the case before us. The application for compensation on account of wrongful dispossessio[n] referred to in cl. (m) must be brought within six months from the date of the wrongful dispossessio[n], and the compensation applied for must refer to some loss or injury already suffered by the applicant, and not to the loss of profits in future year.

The plaintiffs were the lessees of several villages and aver that two years before their lease expired they were dispossessed by the lessor, who appropriated the collections of those two years. But for the wrongful ejection, the lessees would have made the collections on account of those two years. They waive any claim, if they had one, for compensation under cl. (m), s. 95 of Act XVIII of 1873, and sue to recover in a Civil Court the sums actually collected by the defendant in breach of the terms of the contract between them. In such a suit the Collector could not give to the plaintiffs all the relief prayed for the compensation claimable under cl. (m) is for an injury that has already accrued in consequence of the wrongful dispossessio[n], loss of seed sown, or of crop, or otherwise, on account of the harvest immediately following the wrongful dispossessio[n]. The ordinary tenant has no claim for compensation on account of future years ; for under cl. (n), s. 95 of the Act, he can at once claim recovery of occupancy of the land from which he has been wrongfully dispossessed. So that the claim for compensation for the loss already sustained and for recovery of the land can proceed *pari passu*.

"Tenant" has not been defined in the Rent or Revenue Acts, though "land-holder" has been defined to be the person to whom a tenant is liable to pay rent, and rent is whatever is to be paid, delivered, or rendered by a tenant on account of his holding, use or occupation of land. In Act XVIII of 1871, an Act for the levy of rates on land in the North-Western Provinces, tenant is described [343] as any person using or occupying land and liable to pay rent thereof, and land means land used for agricultural purposes, or waste land which is culturable. Again, in the Rent Act there is no distinction made between a tenant holding on a patah, which is the ordinary term for a ryot's lease and a thikadar katkinadar, or other lessee holding for a term of years a portion of an estate, or the whole of it. Any one to whom the entire estate is leased is, for the term of his lease, placed in the position of the owner as regards the ordinary agricultural tenants of that estate. A lessee of this character does not fall within the provisions of s. 24, 25, 26, or 27 of Act XVIII of 1873, for all other tenants mentioned in s. 27 must be those tenants who do not pay at fixed rates, and who are not proprietary and occupancy tenants, i.e., they must be tenants without a right of occupancy: for the only classes of tenants recognized by s. 10 are—*first*, tenants at fixed rates; *secondly*, ex-proprietary tenants; *thirdly*, occupancy tenants; *fourthly*, tenants without a right of occupancy. Having regard to the definitions referred to above and the classification of tenants in the Act, I find it difficult to bring in the lessee for a term of years of an entire mahal as a tenant without rights of occupancy, and to include him in class 4. It seems to me that the section includes only agricultural tenants and classifies them in their relation to the landlord or other person entitled to receive rent from them; but it does not include persons like the plaintiffs in the case before us, who for a certain fixed annual payment occupy the same position towards the four classes of tenants mentioned in the Act as the absolute owner of the estate would do, had he not for a term of years withdrawn himself from that position by assigning the management of his estate and the collection of rents from the ryots to another. I do not deny that a farmer or lessee could sue or be sued in certain suits under the old Rent Act which has been repealed. But the lessee could not have brought a suit of the nature of the one referred to us in a Revenue Court. He must have gone into a Civil Court. In the present Rent Act, whether designedly or by some accidental omission, an intermediate lessee between the owner of the property and his tenants appears to have been overlooked. Such a lessee might perhaps, as the person entitled to receive the rents from the agricultural tenants, sue for arrears due to him. But I think it doubtful [344] whether he could make an application to a Revenue Court under cl. (n) (application for the recovery of the occupancy of any land of which a tenant has been wrongfully dispossessed), s. 95, Cl. (n) seems the complement of cl. (m), application by a tenant for compensation for wrongful dispossession, which applies to the tenants of the four classes specified in s. 10, and to them only.

With this view of the case, I would say that the suit was not barred, as the claim was not of the nature of an application that could be made to a Revenue Court under cl. (m), s. 95, Act XVIII of 1873, and that it was properly instituted in the Civil Court.

NOTES.

[Revenue Courts have the jurisdiction in suits for possession and mesne profits by the occupancy tenant against the landlord : (1899) 15 All. 387. F. B.]

[1 ALL. 345]

APPELLATE CIVIL.

The 15th January, 1877.

PRESENT :

MR. JUSTICE SPANKIE AND MR. JUSTICE OLDFIELD.

Raja Barda Kant Rai.....Plaintiff
versus
 Bhagwan Das and others.....Defendants.*

Interest under Regulations XV of 1793 and XVII of 1806—Conditional decree for redemption.

Under section 6, Regulation XV of 1793, interest claimable under a bond must not exceed the amount of principal. S. 3, Regulation XVII of 1806, is not inconsistent with the application of Regulation XV of 1793, inasmuch as the Regulation of 1806 refers to *rates* of interest, and the Regulation of 1793 to *accumulations* of interest irrespective of rate.

A conditional decree fixing a period for payment of money found to be due on mortgage-bonds entitling the mortgagor to redemption, though not claimable as of right by the mortgagor, who ordinarily should be ready at once with his money, is a proper and judicious order passed by an Appellate Court, where the Court of first instance determined the amount payable under the mortgage, but failed to fix any time in its decree for the payment of such amount.

THE plaintiff in this suit sued, tendering payment of Rs. 700, amount due on two bonds, one for Rs. 500, bearing no interest, and the other for Rs. 200, bearing interest at fifteen per cent. per annum to redeem and recover possession of three pucca houses with land appurtenant thereto, mortgaged by Krishna Ram, the agent of the plaintiff's ancestor, under a deed dated Magh badi, 11th Sambat 1851, or 16th January 1795, to Musammat Pema, to whom [345] possession of the property was given under the deed. The bond for Rs. 200 bearing interest contained a proviso that it should be tacked on to the mortgage-deed. The mortgagee's rights in two of the houses were sold by her representatives to third persons under a deed, dated 4th January 1844, and the third house was sold under a deed, dated the 28th June 1872, to Musammat Dakhee, as the ancestral property of the representatives of the mortgagee, the sale-deed containing no mention of the mortgagor's right therein.

The plaintiff's agent deprived Musammat Dakhee of possession of the third house; and in a regular suit instituted by her for recovery of possession by virtue of the sale-deed, dated 28th June 1872, it was eventually decided by the High Court in special appeal on the 31st March 1874, that Musammat Dakhee was entitled to possession as mortgagee, but not as proprietor under the sale-deed of 28th June 1872.

* Special Appeal, No. 1076 of 1876, against a decree of W. R. Benson, Esq., Officiating Judge of Benares, dated the 31st May 1876, modifying a decree of Syed Ahmed Khan, C.S.I., Subordinate Judge of Benares, dated the 31st August 1876, decreeing the plaintiff's claim.

The several defendants in possession under the above-named deeds pleaded limitation, and that plaintiff was not entitled to redeem without payment of the sum of Rs. 2,357-8-0, interest at fifteen per cent. per annum due on the bond for Rs. 200 tacked on to the original mortgage-deed, dated 16th January 1795, and to a further sum for additions, improvements, and repairs, made to the premises under the terms of the said deed.

The Subordinate Judge held that limitation was saved by the acknowledgement of mortgage rights contained in the deed of 4th June 1844, which recited the mortgagors' rights in all three houses as well as by the High Court decision of 31st March 1874, and decreed plaintiff's claim on payment of Rs. 1,000, allowing Rs. 200 as maximum interest on the tacked bond for Rs. 200, under s. 6, Regulation XV of 1793, and Rs. 50 principal, plus Rs. 50 interest, for necessary repairs made to the buildings, and rejected the defendant's claim to the cost of the improvements. On defendant's appeal to the Judge he confirmed the Subordinate Judge's decision, but modified the decree of the Court of first instance by making redemption conditional upon the payment of the amount found to be due within one month from date of Appellate Court's decision. The plaintiff in special appeal to the High Court impugned the validity [346] of the Judge's decree restricting the right of redemption to a period which curtailed statutory rights, and the defendants respondents in special appeal filed objections to the Judge's decree under s. 348, Act VIII of 1859, on the grounds that Regulation XV of 1793 was not applicable to the case, that defendants (respondents) were entitled to the cost of improvements as well as repairs, and that the Judge was not justified by law in giving plaintiff the benefit of a conditional decree for redemption.

Lala Lalta Parshad for the Appellant.

Munshi Hunuman Parshad for the Respondent.

The High Court **Judgment** after giving the facts of the case proceeded to determine the points in special appeal as follows:—

The plaintiff has appealed only with reference to that part of the judgment fixing a period for payment. We are of opinion that his objection cannot be maintained. As the Lower Court's decree stood, the payment might be made so long as the decree remained capable of execution, the Judge's order limiting the period to a fixed one of one month from the date of his decision appears to be proper and judicious; a conditional decree of this nature cannot be claimed as of right by the mortgagor, who ordinarily should be ready at once with his money, and it scarcely lies in his mouth to question the order of the Court as exercising a discretion in this respect.

The respondents have preferred objections under s. 348, Act VIII of 1859, to the effect that Regulation XV of 1793 does not apply to the mortgage in suit so as to limit the interest in any way, and that the cost of improvements should have been allowed to them, and that a conditional decree should not have been given.

On the last point we see no reason to interfere, the Courts have been in the habit of granting such decrees under certain circumstances, and we cannot say that the order is not justified in this case.

The deed, which is the subject of this suit, was executed on 16th January 1795, and the determination of the suit is governed by the law applicable to the province of Benares.

Regulation XV of 1793 was extended to the Province of Benares by s. 2, Regulation XVII of 1806, and we are of opinion that s. 6, Regulation XV of 1793, will govern this case, and [347] that the lower Court's decision applying that provision, and only allowing the amount of interest on the loan of Rs. 200, equivalent to the principal, is correct.

By s. 6 of Regulation XV of 1793 "if the interest on any debt calculated according to the rates allowed by this Regulation shall have accumulated so as to exceed the principal, the Courts are not in any case whatever, excepting the cases specified in s. 12," (and this is not one of those cases) "to decree a greater sum for interest than the amount of such principal."

This section was extended to the province of Benares by s. 2, Regulation XVII of 1806, and came into force on 1st January 1807, that is, it will govern the decision of suits instituted after that date; the Regulation nowhere declares that it shall not have retrospective effect in cases when the cause of action may have arisen prior to that date.

There is nothing in s. 3, Regulation XVII of 1806, inconsistent with its application. That section does no more than declare the *rate* at which interest is to be decreed in cases where the cause of action has arisen before a certain period; s. 3, Regulation XVII of 1806, refers to *rates* of interest; s. 6, Regulation XV of 1793, to *accumulation* of interest irrespective of rates. The two sections should be read together and so applied.

Nor is there anything in s. 6, Regulation XVII of 1806, which affects the question before us. That section declares that the rule by which redemption of mortgaged property takes place when the principal sum lent and simple interest due thereupon have been realized from the usufruct, shall not have retrospective effect in the province of Benares, but we are not called upon to apply that rule in the case before us, which is not a case where there is a question of principal and interest having been realized from the usufruct, but is one where interest is claimed on a loan and is realizable otherwise than from usufruct, and where the interest has accumulated so as to exceed the principal. It is a case to which s. 6, Regulation XV of 1793, is peculiarly applicable. We notice a decision of this Court at p. 194 of the volume for 1867, where the rule in s. 6, Regulation XV of 1793, has been applied. We also consider that the Judge is right in disallowing respondents [348] credit for expenses incurred in improvements of the property; they appear to have been unnecessary and not sanctioned by the terms of the mortgage.

We affirm the decree of the lower Appellate Court, and dismiss the appeal, but each party will pay their own costs of this appeal.

[1 ALL. 348]

APPELLATE CIVIL.

The 30th January, 1877.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR. JUSTICE OLDFIELD.

Musammat Bhawani Kuar and others..... Judgment-debtors

versus

Gulab Rai and others..... Decree-holders.*

Act VIII of 1859, ss. 236, 252—Decree charging land—Immoveable property—Sale of judgment-creditor's right in immoveable property.

The sale of a decree charging land for its satisfaction in the course of execution proceedings against judgment-creditor is a sale of an interest in immoveable property. Held, that the provisions of the Code of Civil Procedure relating to sales of immoveable property will apply to such sale.

In the course of execution proceedings by Gulab Rai and another against Musammat Bhawani Kuar and another, the decree-holders attached and brought to sale a decree, dated 23rd August 1875, held by the judgment-debtors against Madho Singh and others in which certain land stood charged as liable to sale. The said sale was effected through the Court of the Subordinate Judge of Aligarh as though the decree, notwithstanding that it charged immoveable property, was itself moveable property. On application by Musammat Bhawani Kuar and another, judgment-debtors, to set aside the sale as invalid on the ground of its having been effected as a sale of moveable property, and no sale notification of the property as immoveable property having been promulgated or affixed, in consequence of which irregularities property worth Rs. 1,869 was sold for only Rs. 1,000, the Subordinate Judge held that the sale of the decree was of moveable property, and that under section 252, Act VIII of 1859, the said sale could not be set aside. The Judge on appeal by the judgment-debtors was of opinion that inasmuch as only the [349] rights in the decree had been sold, the Subordinate Judge was right in holding the sale to have been one of moveable property and dismissed the appeal.

In special appeal to the High Court, the judgment-debtors contended that the sale of a decree charging immoveable property should be governed by the law applicable to sales of immoveable property.

Lala Lalla Parshad and Pandit Ajudhia Nath for Appellant.

Pandit Bishambhar Nath and Pandit Nand Lal for Respondents.

* Miscellaneous Special Appeal, No. 71 of 1876, from an order of H. M. Chase, Esq., Judge of Aligarh, dated the 2nd August 1876, affirming an order of Maulvi Sami-ul-lah Khan, Subordinate Judge of Aligarh, dated the 20th May 1875.

The High Court ruled the point in the following Judgment remanding the case to the Judge for decision on the merits :—

A preliminary objection is taken by the pleader for the respondents under s. 252 of the Procedure Code which provides "no irregularity in the sale of moveable property under an execution shall vitiate the sale, but any person who may sustain any injury by reason of such irregularity may recover damages by a suit in court." But this assumes that the subject of sale here is moveable property, and that the judgments of the lower Courts are right in that respect. We are, however, clearly of opinion that the right which is the subject of sale under the decree is legally of the nature of immoveable property, and that section 252 does not therefore apply. As against the appellants the decree is for Rs. 1,593-3-0 together with Rs. 194-10-6, amount of costs, and it orders absolutely that the money shall be recoverable from 5 biswas, 11 biswansis and 2½ kachwansi.

The decree is, therefore, absolutely for money recoverable by sale of immoveable property hypothecated for its payment. The right and interest which it creates is a right in a judgment-debt recoverable by sale of immoveable property charged with its payment. The decree thus conveyed to the decree-holders a subsisting interest in the nature of a charge on the hypothecated property, and the sale of their rights under the decree must be held to be a sale of such an interest in moveable property to which the provisions of the Code for sales of immoveable property will apply.

We reverse the order of the Judge and remand the case to him for decision on the merits ; he has erred in considering the sale in this case to be a sale of moveable property.

NOTES.

[The better opinion is, however, to treat the secured debt, for purposes of attachment and sale, like any other debt :—(1886) 12 Cal. 546 ; (1893) 20 Cal. 805 ; (1893) 19 Bom. 121 : (1901) 26 Bom. 305 : (1886) 10 Mad. 169 ; (1894) 18 Mad. 437 ; (1882) 5 All. 142 ; (1893) 15 All. 134 ; (1896) 18 All. 469.

In the earlier cases of (1883) 9 Cal. 151 ; (1884) 9 Mad. 5, the rulings were similar to this case.

Decrees treated as immoveable property, see (1886) 10 Mad. 169.]

[350] APPELLATE CIVIL.

The 31st January, 1877.

PRESENT:

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND
MR. JUSTICE SPANKIE.

Stowell, Manager Uncovenanted Service Bank, Limited.....Decree-holder
versus
 Billings.....Judgment-debtor.*

*Act VIII of 1859, ss. 285-348—Act XIV of 1859—Act IX of 1871—
 Compromise under decree—Execution—Limitation—Payments
 under compromise—Proceedings under barred decree.*

Where a decree-holder entered into a compromise with the judgment-debtor agreeing to accept payment by instalments, which was ratified by the Court executing the decree, the case being struck off the execution file on the basis of the compromise and more than three years after the date of the Court's order sanctioning the compromise, subsequent proceedings were taken by the decree-holder to enforce the original decree. *Held*, that such subsequent proceedings when execution of the original decree had been already barred by limitation could not avail to keep the decree alive.

THE execution proceedings in this case arose out of a decree passed by the High Court on the 5th January 1869, against the judgment-debtor for Rs. 7,879-14-5, bearing interest at six per cent. per annum.

The Uncovenanted Service Bank, decree-holder, entered into a private arrangement with the judgment-debtor to accept payment, in monthly instalments bearing interest at 12 per cent. per annum. A petition was presented by the judgment-debtor on the 23rd August 1869 to the Court of the District Judge, executing the decree. This petition notified the terms of the compromise, which acknowledged the decree-holder's right to revert to execution of the original decree with interest at the additional rate in the event of failure of any two consecutive monthly instalments. The Court, on the 7th September 1869, ratified the said compromise and struck off the case from the execution file.

On the 15th February 1873, the decree-holder applied for a certificate under s. 285, Act VIII of 1859, to enable him to execute the decree of 5th January 1869, out of the Court's jurisdiction where the judgment-debtor resided. After notice to the judgment-[351]debtor, the certificate issued on the 25th April 1873. No proceedings were taken by Government under the certificate as the judgment-debtor resumed payment of instalments to the decree-holder direct. On the 15th January 1876, the decree-holder applied to the District Court at Agra, which had issued the certificate in April 1873, to execute the decree of 5th January 1869. The judgment-debtor pleaded that execution was barred by limitation, and that the decree had been satisfied.

* Miscellaneous Regular Appeal, No. 48 of 1876, against an order of H. G. Keene, Esq., Judge of Agra, dated the 22nd April 1876.

The Judge overruled the plea of limitation on holding that under Act XIV of 1859, which he considered to be in force in 1873, the payment of instalments under a duly sanctioned agreement was a proceeding to enforce or keep in force a decree. The Judge cited a case (I. L. R., 1 Bom., p. 63), in support of his view and decided that limitation must be reckoned from date of the proceedings in 1873. On the other hand, the Judge ruled that the compromise of 1869 could not alter or modify the terms of the High Court decree of 5th January 1869, and dismissed the decree-holder's claim to interest thereon at twelve per cent. The decree-holder in appeal to the High Court, among other objections to the mode in which the appellant's account had been prepared, pleaded that in decreeing simple interest at six per cent., and disregarding the arrangement of 1869 accepted by the judgment-debtor, and ratified by the Court, the Judge had acted against law and equity. The judgment-debtor, respondent, filed objections under s. 348, Act VIII of 1859, to the effect that execution of the decree was barred and that the appellant's accounts had been erroneously prepared.

Mr. Conlan, Mr. Raikes, Mr. Mahmud, and the Junior Government Pleader (*Babu Dwarka Nath Banarji*), and *Munshi Hanuman Parshad* for the Appellant.

Mr. Ross and Pandit Bishambhar Nath for the Respondent.

The Judgment of the High Court, after reciting the above facts, continued as follows :—

The Judge holds that as Act XIV of 1859 was in force in March 1873, when the notice to show cause was issued, there was "a proceeding to enforce or keep in force a decree," and therefore the present application made within three years from that date is within time.

[352] But respondent's counsel contends that in 1873, when the above proceedings took place, the decree which appears to be dated 5th January 1869, was dead, and that it was even so if the time be reckoned from the 7th September 1869, when the arrangement referred to was made. He also contends that no arrangement made between the parties, though recognised by the Court can enlarge the period allowed by law for the execution of decrees, nor can the terms of a decree be varied by the Court executing the decree, and in support of this contention he cites the Full Bench ruling of the Calcutta Court dated 4th September 1869 (4 B. L. R., F. B. Rulings, p. 101), Krishna Kamal Singh, D. H., v. Hira Sirdar and others), and a decision of this Court to the same effect (H. C. R., N.-W. P., 1873, p. 100, Abas Imam, Appellant). This Court referred to the ruling of the Calcutta High Court already referred to and held that the receipts of instalments by a decree-holder out of Court in pursuance of a compromise made between him and his judgment-debtor is not a proceeding to enforce or keep in force a decree, and the Court added that the condition in a compromise that on default being made in a certain number of instalments, the decree should be executed in full, cannot prevent limitation from running. This Full Bench decision of the Calcutta High Court held that such a compromise, even though recognised by the Court executing the decree, could not enlarge the limitation, and therefore the ruling in that case applies more strictly to the case before us than the decision of this Court. But the principle is the same in both cases.

When the two instalments fell due in May and June 1872, more than three years had expired since the date of the decree and the fact that there were proceedings in 1873, which would make the application of 1876 within

time, if we think of no service to the decree-holder. We must look behind the application of 1873 when pressed upon the point of limitation, and as more than three years had elapsed between the 7th September 1869 and 15th February 1873, the claim to execute the decree then and now is clearly barred.

We are, therefore, compelled to dismiss the appeal and reverse the order of the Judge, and we must do so with costs as the objections now urged by respondent were taken below.

NOTES.

[See (1879) 2 All. 322; (1881) 3 All. 595.]

[358] FULL BENCH.

The 19th February, 1877.

PRESENT :

SIR ROBERT STUART, Kt., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, MR. JUSTICE SPANKIE, AND MR. JUSTICE OLDFIELD.

Ablakh Rai and others.....Plaintiffs

versus

Udit Narain Rai and another.....Defendants.

Act XVIII of 1873, ss. 8, 9-171—Right of occupancy tenant when transferable—Sale in execution.

Held (by a majority of the Full Bench) that the right of an occupancy tenant is transferable by sale in execution of decree, but only as between persons who have become by inheritance co-sharers in such right.

Per STUART, C. J.—That such right is transferable by sale in execution of decree without restriction.

THIS was a suit to protect a right of occupancy from sale in execution of decree by cancellation of an order passed on the miscellaneous side. One Lekhraj was the occupancy tenant of certain land of which the plaintiffs were the proprietors. Udit Narain Rai, defendant in the suit, caused Lekhraj's right of occupancy in the land to be attached in execution of a decree which he had obtained against him in a Civil Court. The plaintiffs preferred an objection to the sale of such right, but the same was disallowed on the 6th July 1874.

Both the lower Courts dismissed the suit.

On special appeal by the plaintiffs to the High Court, the Court (SPANKIE and OLDFIELD, JJ.) referred to the Full Bench the question whether, having

* Special Appeal, No. 288 of 1876, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Ghazipur, dated the 22nd December 1875, affirming a decree of Maulvi Syed Bakshah, Munsif of Muhammadabad, dated the 23rd August 1875.

regard to s. 9 of Act XVIII of 1873, the right of occupancy held by occupancy tenants can be sold by public auction in execution of a decree of the Civil Court.

Maulvi Obeidul Rahman for the Appellants.

Munshi Hanuman Parshad for the Respondents.

Stuart, C.J.—My opinion on the question submitted by this referee is an answer in the affirmative, and that the right of occupancy held by occupancy tenants can be sold by public auction in execution of a decree of the Civil Court. Section 9, of Act XVIII of 1873, after declaring that the rights of tenants at [385] fixed rates shall be heritable and transferable, goes on to provide as follows :—“No other right of occupancy shall be transferable by grant, will, or otherwise, except as between persons who have become by inheritance co-sharers in such right.” I consider that the words “or otherwise” must be understood to be a general expression controlling the particular words which go before “grant will” and to mean “or otherwise by the voluntary act or deed *eiusdem generis* of the parties,” and that they do not mean to exclude a transference of the right by sale in execution of a decree.

Our attention at the hearing was directed to section 171 of the Act. By that section it is provided :—“In the execution of any decree for the payment of arrears of rent or revenue, or of money, under this Act, if satisfaction of the judgment cannot be obtained by execution against the person or moveable property of the debtor, the judgment-creditor may apply for execution against any immoveable property belonging to such debtor.” If this section should be read in connection with s. 9, the construction I have put on the latter might be said to be strengthened, but it is unnecessary to consider that, as I hold that s. 9 is sufficient for this case, and that whatever else the parties in possession of the right of occupancy may do as voluntary agents, they cannot prevent a transfer by sale of that right under a decree against them, for in my opinion the right to enforce legal process against property cannot under any circumstances be taken away excepting by express words to that effect.

Pearson, J.—Section 9, Act XVIII of 1873, declares that the rights of occupancy tenants other than tenants at fixed rates shall not be transferable by grant, will, or otherwise, except as between persons who have become by inheritance co-sharers in such rights, which, therefore, if sold at auction in execution of a decree of the Civil Court, can only be sold to such persons, but subject to that restriction may thus be sold.

Turner, Spankie and Oldfield., JJ, concurred in the following Judgment:

We see no reason to think that the Legislature intended to restrict the provision of the second paragraph of s. 9 of the Rent Act to voluntary transfers only. The first paragraph declares [385] generally that the rights of tenants at fixed rates shall from the date of the passing of the Act be heritable and transferable. In, as we read them, equally general terms the second paragraph declares that no other right of occupancy shall be transferable by grant, will, or otherwise, except as between persons who have become by inheritance co-sharers in such rights. The term “otherwise” is strictly equivalent to the term in any other way, and must, we think, include all transfers, whether voluntary or involuntary. It follows that rights of occupancy other than at fixed rates are not transferable by auction sale in execution of decree to strangers, but may be transferred by such sale to any of the persons in whose favour the exception is specially declared.

NOTES.

[The limitation does not apply when the land-holder is himself the decree-holder:-
(1878) 1 All. 547 affirmed in (1879) 2 All. 451. Mortgage of itself does not entail forfeiture:-
(1910) 30 Bom. 290.]

[1 All. 386]

FULL BENCH.

The 21st February, 1877.

PRESENT:

SIR ROBERT STUART, Kt., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, MR. JUSTICE SPANKIE, AND
MR. JUSTICE OLDFIELD.

Paras Ram.....Decree-holder

versus

Gardner.....Judgment-debtor.

Act IX of 1871, sch. vi, art. 167—Act VIII of 1859, s. 246—Execution of decree—Limitation—Proceeding to enforce—Previous application—Intermediate suit—Objector.

Held by a Full Bench (PEARSON, J., dissenting) that an application to execute a decree against judgment-debtor's property, made more than three years after the last application for execution was not barred by limitation under art. 167,† sch. ii, Act IX of 1871, when the last application was interrupted by a successful objector against whom the decree-holder had to bring a regular suit and succeeded in obtaining a decree; and that the renewed application to execute within three years from the date of the decree in the said suit was not a fresh application for execution against the judgment-debtor, but a continuance or revival of the previous application interrupted by the objector.

Per PEARSON, J., contra that under art. 167 sch. ii, Act IX of 1871, execution of decree was barred.

PARAS RAM sued one Jehangir Samuel Gardner on a bond hypothecating a ten biswa share of Datlana, and obtained a decree on the 23rd March 1871. An application for the execution of this decree was filed on the 10th June 1871; and the 21st August 1871 was fixed for auction sale of the property.

[386] Ono Dabi Das objected to the attachment of the said property in execution of Paras Ram's decree, on the ground that the share aforesaid had been advertised for sale in satisfaction of the decree of Birj Basi and others, and had been purchased by the objector. The objection was allowed on the 16th August 1871, and the property was released from attachment.

* Miscellaneous Special Appeal, No. 10 of 1876, from an order of H. M. Chase, Esq., Judge of Aligarh, dated the 8th December 1875, affirming an order of Maulvi Sami-ul-lah Khan, Subordinate Judge of Aligarh, dated the 2nd July 1875.

† [Art. 167 :—*q. v. supra*, 1 All. 285.]

On the 17th June 1872, Paras Ram sued to bring to auction sale a seven-biswa share out of the ten annas purchased by Dabi Das. In this suit Dabi Das was the sole defendant, and it was decreed against him on the 10th August 1872.

Subsequently on the 25th March 1875, Paras Ram applied to the Court of the Subordinate Judge of Aligarh to execute the decree dated 23rd March 1871, against Gardner.

The Subordinate Judge ruled that under the provisions of art. 167, sch. ii, Act IX of 1871, execution of the decree was barred, the suit against Dabi Das not being an application to enforce or keep in force the decree against Gardner.

The Judge in appeal holding that the decree-holder could have filed applications to keep the decree in force against Gardner, whilst prosecuting the suit against Dabi Das, confirmed the judgment and decree of the Subordinate Judge.

Paras Ram in special appeal before the High Court contended that the regular suit against Dabi Das was an application to enforce the decree of 23rd March 1871, and that art. 167, sch. ii. of the Limitation Act, did not apply to the case.

The Court (TURNER and OLDFIELD, JJ.) referred for decision by the Full Bench the question whether Paras Ram's application, dated 25th March 1875, for execution of the decree, dated 23rd March 1871, was an application brought within the period allowed by art. 167, sch. ii, Act IX of 1871, referring to two cases (VIII W. R., 98 & 99) of the Calcutta High Court decided under Act XIV of 1859.

The Junior Government Pleader (*Babu Dwarka Nath Banarji*), Pandit Bishambhar Nath, and Munshi Hanuman Parshall for Appellant.

The Respondent was unrepresented.

[357] The following Judgments were delivered by the Court :—

Stuart, C.J.—We are asked by the reference whether the application of the 25th March 1875, has been brought within the period allowed by art. 167, sch. 2, Act IX of 1871. It was suggested that art. 167 does not apply to such a case, and no doubt it does not come so literally and precisely within the limits provided by that article. But in my view art. 167 does apply, inasmuch as the application of the 25th March 1875, was not a new or fresh act, but was in legal continuance of the application of June 1871, and in my judgment therefore art. 167 applies constructively, the three years allowed by the article being reckoned from the 10th August 1872, when Paras Ram's rights as against Dabi Das were restored to him.

That the execution of the decree is not barred clearly appears from the dates and legal character of the procedure. Paras Ram, the appellant, obtained his decree on the 23rd March 1871, and he applied for execution of it by attachment and sale of the hypothecated property on the 10th of June 1871, and the 21st of August 1871, was fixed for the sale. In the course of the attachment, one, Dabi Das objected to the sale on the ground that he had bought the property in execution of a decree he held against the same judgment-debtor, and on the 16th of August 1871, his objection was allowed. On the 17th of June 1872, (being within a year from the 16th August 1871), Paras Ram brought a regular suit against Dabi Das and obtained a decree in his favour on the 10th of August 1872. On the 25th of March 1875, Paras Ram filed an application for the execution of his original decree of March 1871.

It is not explained why he allowed the interval to elapse without attempting to use his decree, but he had three years from the 10th of August 1872, and, therefore, as between that date and the 25th of March 1875, he was clearly within his rights.

The interruption to the execution of his decree was not occasioned by any fault or laches of his own, but was caused by the illegal intervention of Dabi Das. Paras Ram's procedure, therefore, under his decree must be held to have been legally continuous, and he may proceed to its execution.

[358] As to the application of the 25th of March 1875, being a fresh application having no such connection with what had gone before as we can now take judicial notice of, I cannot so regard it. On referring to it, I find that it recites the whole previous procedure and simply repeats the prayer for execution of the decree which was made in June 1871. It was, therefore, an application in legal continuance of the former process up to the 10th August 1872, when Paras Ram obtained his decree in regular suit, and it ought to be granted as being within time.

Pearson, J.—The application of the 25th March 1875 may be regarded as an application to the Court to proceed with the former application of the 10th June 1871, the proceeding under which had been interrupted by Dabi Das' objection and the order allowing it; but if so regarded, is, nevertheless, in substance and effect an application for the execution of the decree of the 23rd March 1871; and art. 167, sch. 2, Act IX of 1871, is applicable to it, and requires that it should have been presented within three years from the date of the former application above mentioned. It can scarcely be contended that there is no limitation to the time within which the decree-holder was competent to make such an application as that of the 25th of March 1875; but if the limitation prescribed by art. 167 be not applicable, I do not find any other limitation provided by the law. I see nothing in the law to warrant us in ruling that he was at liberty or bound to make such an application within three years from the date of the decree obtained by him in his suit against Dabi Das on the 15th August 1872. It might be reasonable and equitable to exclude from the computation of the period of limitation fixed by art. 167 the time during which such a suit was pending, but such a course is not authorized by the law. The absence of any provision for the exclusion of that time may be a defect in the law, and cases may be supposed in which the defect might cause hardship. In the present case the decree-holder delayed for 10 months to bring his suit against Dabi Das, and after obtaining a decree therein delayed for thirty-one months to apply to the Court to proceed with the execution of the decree of the 23rd March 1871. His suit against Dabi Das was pending less than two months; and the exclusion from the computation of the period of limitation of the time during which it was pending would not [359] bring his application within time. In my opinion the lower Courts have rightly held art. 167 to be applicable to his application of the 25th March 1875, and to preclude its entertainment.

Turner, J.—The application made for the execution of this decree by attachment and sale proceeded to such a point that as against the judgment-debtor a sale was ordered when its further prosecution was interrupted by the intervention of a third party, who succeeded in establishing his objection to the satisfaction of the Court executing the decree. The only course open to the decree-holder to procure a revision of the order allowing the objection was by the institution of a regular suit against the objection. This course he adopted,

and having obtained a decree setting aside the order allowing the objection and declaring the liability of the property to be brought to sale in execution of the decree he had obtained against the original judgment-debtor, he then applied to the Court executing that decree to proceed with the application for execution which had been interrupted. On the ground that the application we are considering is not a fresh application to execute the decree, but an application to carry out the order which as against the judgment-debtor had become final, and of which the prosecution was interrupted by the allowance of the objection of a third party since disallowed, I am of opinion that the provisions of the Limitation Act relating to applications for the execution of decree do not apply to it.

Spankie, J.—I accept the view that the application of the 25th March 1875 must be regarded as one for a continuance of the former proceedings in execution and not as a fresh application for execution within the meaning of art. 167, sch. ii, Act IX of 1871. Section 246, Act VIII of 1859 provides that a suit may be brought to contest an order made under it, and if the suit be duly instituted within one year as required by Act IX of 1871, and the order of the Court in execution be reversed, it appears to me that the decree-holder is at liberty to ask that the order which should have been, but was not made, should issue.

I hardly think that we are called upon to consider whether this view of the case would not do away with limitation altogether. [360] All that is contended is that the former application was practically reversed when a decree in the regular suit allowed by s. 246, Act VIII of 1859, reversed the order of the Court executing the decree. It may be said that there are circumstances in the case referred to us, which are unfavourable to the decree-holder and show that he did not use due diligence in bringing his suit or in making his application to revive the former execution proceedings. This may be so, and, if so, it is for the divisional bench to deal with that part of the case.

Oldfield, J.—I think we may hold that the last application may be considered as a continuance or renewal of the former application for execution in which the proceedings had been interrupted by the reference to the Civil Court, and were renewed on the second application, the latter will not therefore be an application to which the period of limitation in art. 167 will apply.

The Division Bench (TURNER and OLDFIELD, JJ.) made the following order in the special appeal.—In accordance with the opinion expressed by the majority of the Court, we hold the application within time. Setting aside the order of the Courts below, we remand the application for disposal on the merits to the Subordinate Judge's Court. Costs of the appeal in the Judge's Court and in this Court to abide and follow the result.

NOTES.

[LIMITATION—STEP IN AID OF EXECUTION—

Where the obstacle related to a different kind of remedy or to only part of a remedy and not to its entire extent, then, limitation is not suspended in respect of the other remedy or the unexhausted part (as the case may be) :—(1889) 7 Bom. 293; (1884) 7 Mad. 595; (1889) 17 Cal. 268.

The ruling in this case applies where the obstacle is not of one's own making :—(1882) 5 All. 249; (1881) 8 All. 484; (1895) 17 All. 425; (1896) 18 All. 482; (1896) 19 All. 71; (1900) 28 All. 18; (1880) 5 Bom. 29; (1891) 16 Bom. 294; (1895) 28 Cal. 897; 437; (1904) 28 Mad. 50; 14 M. L. J. 401; (1896) 10 Mad. 22.]

[1 All. 360]

APPELLATE CIVIL.

The 2nd February, 1877.

PRESENT:

MR. JUSTICE PEARSON, AND MR. JUSTICE TURNER.

Chunia and another.....Plaintiffs

versus

Ram Dial and another.....Defendants.*

Act VII of 1870 (Court Fees Act), ss. 3 (c), 12, and sch. ii, art. 17 (iii)—Suit for a Declaratory Decree—Consequential Relief—Decision of questions relating to valuation—Appeal.

Section 12 † of the Court Fees Act prohibits appeals on questions relating to valuation for the purpose of determining the amount of a fee, but does not prevent a Court of appeal from determining whether or not consequential [361] relief is sought in a suit, so that it may determine under what class of cases the suit falls for the purpose of the Court Fees Act.

A suit by a person against whom an order has been made, under s. 246 of Act VIII of 1859, disallowing his claim to the attached property, for a decree declaring his right to the property, need not be valued according to the value of the property, but can be brought on a stamp of Rs. 10, under Act VII of 1870, sch. ii, art. 17§ (iii)‡

* Special Appeal, No. 1032 of 1876, from a decree of S. S. Molville, Esq., Judge of Cawnpore, dated the 26th June 1876, affirming a decree of Babu Ram Kali Chaudhri, Sub-ordinate Judge of Cawnpore, dated the 27th September 1875.

†[Sec. 12.—Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal, shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit : Decision of questions as to valuation.]

ii. But whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided, to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of section ten, paragraph ii shall apply.]

Number.	Fixed fees.	Proper fee.
Plaint or memorandum of appeal in each of the following suits :	*	*
iii. to obtain a declaratory decree where no consequential relief is prayed.	*	Ten rupees.]

† See, however, *Musti Jalaluddeen Mahomed v. Shohorullah*, 15, B. L. R., App. 1, in which it was held that a suit brought under the provisions of s. 246 of Act VIII of 1859 to set aside an order allowing a claim to attach property and releasing the property from attachment is a suit to try the title and establish the right of the person who brings the suit, and such a suit must be valued according to the value of the property, and cannot be brought upon a stamp of Rs. 10, under No. 17 of sch. ii of the Court Fees Act; and *Motichand Jaichand v. Dadabhai Pestonji*, 11 Bom. H. C. Rep., A. C. J. 186, where it was held that a suit, having for its object the relief of property from attachment, seeks consequential relief.

‡ Cl. iii, Art. 17.

THIS was a suit in which the plaintiffs, who were still in possession, claimed a declaration of right as owners to the moiety of certain shops, and to the whole of certain other shop. They had preferred a claim to this property, when attached in execution of decree, but after investigation their claim had been disallowed under s. 246 of Act VIII of 1859, on the 27th March 1875.

On the institution of the suit, the plaintiffs paid in respect of the plaint a court fee of Rs. 10, being the fixed fee payable under Act VII of 1870, sch. ii, art. 17 (iii), in respect of a plaint or a memorandum of appeal in a suit where no consequential relief is prayed. Subsequently by order of the Court of First Instance, they had paid a court-fee computed on the market value of the property in suit. The Court of First Instance dismissed the suit.

The plaintiffs appealed, paying in respect of their memorandum of appeal the same court-fee as they had at first paid in respect of the plaint in the suit. On the 5th May 1876, on the appeal coming on for hearing, the lower Appellate Court being of opinion that consequential relief was sought in the suit, returned the memorandum of appeal to the plaintiffs, directing them to pay in respect of the same a court-fee computed on the market value of the property, and to present it again within three days. On the 26th June 1876, the plaintiffs having failed to present the memorandum of appeal as directed, the lower Appellate Court dismissed the appeal.

[362] On special appeal by the plaintiffs to the High Court, it was contended on their behalf, that inasmuch as no consequential relief was sought in the suit, but a declaration of right only, the plaintiffs were right in paying a fee, in respect of their memorandum, of Rs. 10.

Mir Akbar Husain for the Appellant.

Pandit Ajudhia Nath and Babu Aprokash Chander Mukerji for the Respondents.

Judgment:—It is contended by the respondents that the Court is bound by the provisions of s. 12 of the Court Fees Act and cannot determine whether this suit is one in which specific relief is sought or not, so as to determine under what class of cases it falls for the purpose of the Court Fees Act. We observe, and it has been so held in the Calcutta Court (see *Ganga Monee Chowdhraein v. Gopal Chunder Roy* 19 W. R. 214.) that s. 12 of the Court Fees Act prohibits appeals on questions "relating to valuation for the purpose of determining the amount of a fee." There is no question of valuation for the purpose of determining the amount of a fee raised in the appeal before us, for if the appellant is right in his contention, a special and certain fee is fixed for all suits of the nature of the present suit, and no question of valuation arises. We therefore overrule the objection and entertain the appeal.

It appears to us that the appellant correctly contends he seeks a declaration of right and no consequential relief. The Civil Procedure Code declares that a person against whom an order is passed under s. 246 may bring a suit to establish his right. If he obtains a decree in such a suit, he will then present himself to the Court executing the decree by which the order was made, and that Court will be bound to recognize the right declared, and either withdraw or order attachment as the case may be. We set aside the decree of the lower Appellate Court, and remand the case to that Court for decision on the merits. Costs of this appeal to abide and follow the result.

Decree set aside and case remanded.

NOTES.

[I. COURT FEES ACT—SUIT AS TO ATTACHED PROPERTY—

The Allahabad High Court dealt with this subject fully in (1894) 16 All. 308 F. B. These were earlier cases, (1889) 11 All. 365; (1884) 6 All. 466; 241; (1880) 2 All. 869; 720; 63

The opinion of the Madras High Court is contained in (1881) 4 Mad. 181; (1891) 15 Mad. 288; of the Bombay High Court in (1870) 4 Bom. 575; (1886) 10 Bom. 610; (1884) 9 Bom. 20; of the Calcutta High Court in (1886) 13 Cal. 162; (1887) 15 Cal. 104; (1903) 31 Cal. 511.

II. APPEAL AS TO VALUATION—

Appeal lies as regards questions as to the category or class to which the suit belongs, but not as to valuation within that class:— (1881) 4 Mad. 204; (1890) 14 Mad. 169; (1894) 4 M. L. J. 183; (1901) 28 Cal. 334; (1882) 12 C. L. R. 148; (1890) 12 All. 129; (1896) 19 All. 165; (1898) 28 Bom. 486.]

[363] APPELLATE CIVIL.

The 14th February, 1877.

PRESENT:

SIR ROBERT STUART, Kt., CHIEF JUSTICE, AND MR. JUSTICE PEARSON.

Abdul Rahim.....Defendant

versus

Racha Rai and another.....Plaintiffs.*

Act VIII of 1859 (Civil Procedure Code), ss. 376, 378—Review of judgment—Appeal.

Although the order itself for granting a review of judgment is final, yet in appeal against the decision passed in review, objection may be taken that the review was improperly granted.†

An application for a review of judgment was made to a Court of appeal on the ground that certain very material documents on which the Court of First Instance had relied had been summarily discredited without being inspected by the Court of Appeal, and that the Court of Appeal had erred in declaring the report of a Commissioner appointed by the Court of First Instance for the purpose of making a local enquiry to be unworthy of reliance because he was a muharrir of the Court of First Instance.

Held that, in granting the review applied for, the lower Appellate Court had not exceeded the discretion vested in it by law.

THE Court of First Instance gave the plaintiffs in this suit a decree on the 29th June 1875. On appeal by the defendant the lower Appellate Court, on the 29th

* Special Appeal, No. 1028 of 1876, from a decree of Pandit Har Sahay, Subordinate Judge of Azamgarh, dated the 15th July 1876, affirming a decree of Lala Mahabir Prasad, Munisif of Nagra, dated the 29th June 1875.

† See also *Bhyrab Chunder Surnakhi v. Madhubra Surnakhi Chowdry*, 11 B. L. R. 428, in which case it was held by a Full Bench of the Calcutta High Court, that parties in a special appeal were at liberty to show that there had been error or defect in procedure by the granting of the review, which had affected the decision of the case upon its merits by producing a different decision from what had been before come to. See however *Gurumurti, Nayudu v. Pappa Nayudu*, 1 Mad. H. C. Rep. 164; and *Dhunka Devela v. Hira Ramla*, 4 Bom., H. C. Rep., A. C. J. 67.

November 1875, reversed the decree of the Court of First Instance and dismissed the suit. On the 17th January 1876, the plaintiff applied for a review of the lower Appellate Court's judgment. On the 15th April 1876, the lower Appellate Court made an order for granting the review, and on the 15th July 1876, after re-hearing the appeal, it dismissed the same.

On special appeal by the defendant to the High Court it was contended that the review of judgment was improperly granted, inasmuch as no new evidence had been adduced, nor was it shown [364] that there had been any error in law in the former judgment, and that if any new evidence was adduced no reason as required by law was given for its not having been produced at the original trial of the case.

On behalf of the respondents it was contended that an order for granting a review of judgment was final, and no objections to the same could be taken in appeal.

Mr. Raikes, Pandit Bishambhar Nath, and Shah Asad Ali for the Appellant.

Lala Lalta Parshad for the Respondents.

The following Judgments were delivered by the Court:—

Stuart, C.J.—I agree with Mr. Justice PEARSON that although an order on an application for a review of judgment is final, objection may be taken in special appeal against that order, and that, therefore, the present special appeal was competently preferred. I am also of opinion with him that the review of judgment was properly granted in this case, and that the evidence on which it was based was material and essential to the just determination of the suit.

In his judgment of the 29th November 1875, the first Subordinate Judge points out the particulars in the way of evidence in regard to which the plaintiffs' case in his opinion was defective, *viz.*, the absence of any sufficient evidence of the arbitration award and of the patwari's deposition; and further, in allusion to the circumstances that the plaintiffs had not adduced any parol testimony, he remarks—"Besides this no documentary evidence, such as 'khasra,' 'khatani,' or rent-roll, has been filed on the part of the plaintiffs, from which it could have been shown that the names of the plaintiffs and their ancestors were ever recorded as shareholders in respect of this grove." All this important information, however, was subsequently supplied, and it was considered by the second Subordinate Judge when the application for a review of his predecessor's judgment (in which application, it is to be observed, it was distinctly offered) was before him, and as the new evidence, which it appeared had been filed with some other record, and the first Subordinate Judge had not, therefore, an opportunity of perusing it [365] showed not only good and sufficient reason, but also evident error and omission, the review was properly and justly granted. This special appeal, therefore, fails and is dismissed with costs.

Pearson, J.—Under the provisions of s. 378,* Act VIII of 1859, the order made by a Court to which an application for a review of judgment is preferred,

*[Sec. 378:—If the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject the application, but if it shall be of opinion

The order of the Court for granting or refusing the review is final.

that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, the Court shall grant the review, and its order, in either case, whether for rejecting the application or granting the review shall be final.

Provided that no review of judgment shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree of which a review is solicited.]

whether for rejecting the application or for granting the review, is final, but I am nevertheless of opinion that objection may be taken in appeal against the decision passed on review on the ground that the review was improperly granted. I proceed, therefore, to consider the pleas in appeal.

In his decision of 29th November 1875, the officiating Subordinate Judge observed that "the Munsif, in proof of the plaintiff's right, had relied on a copy of the arbitration award, dated Aghan Badi 5, 1265 Fasli, wherein the share of Adhar Rai's brothers, i.e., the ancestors of the plaintiffs, has been declared. A copy of the award is however, not filed on the record in this case, though it may have been filed with the records of the case formerly decided, but there is no trace of the original award, and the Munsif himself admits that it is not signed by the presiding officer. Then, under these circumstances, it is quite useless to rely on such a paper which is not free from suspicion, and no argument can be adduced in support of its genuineness. The copy of the patwari's deposition also is not filed in this case, and the said copy, without its original, and in absence of the original arbitration award, is of no use." The lower Appellate Court's proceeding of the 15th April last states that "the application for review is filed with three copies, and it is urged briefly that the aforesaid copies were not perused at the time of the disposal of the appeal case, and that they go to establish the averment of the plaintiffs. It appears on reference to the record that really the abovementioned copies were not perused at the time of disposing of the appeal case. The reason for the non-production of the said copies on the first occasion as stated by the petitioners is that the copies in question were filed with the record of some other case, and this appears to be a good reason." The application for review of judgment was therefore allowed, and the result has been the confirmation of the judgment of the Court of First Instance.

Referring to the pleas in appeal, I remark that the adduction of newly discovered evidence is not the only ground on which a [366] review of judgment may be allowed. "Any other good or sufficient reason" is permitted by s. 376, and s. 378 allows a review to be granted when "necessary to correct an evident error or omission, or otherwise requisite for the ends of justice." In this case it would seem that some very material documents on which the first Court had relied had been summarily discredited without being inspected by the lower Appellate Court, which, if it did not think proper to call for and inspect the record of the case in which copies of those documents were to be found, might at least have given the plaintiffs permission to file copies of them. The application for review of judgment urged, moreover, that the lower Appellate Court, in its decision of the 29th November, 1875, had erred in declaring the report of the Commissioner appointed by the Munsif for the purpose of making a local enquiry to be unworthy of reliance, because he was a muharrir of the Munsif's Court, and it is presumable that the lower Appellate Court was influenced by this argument in granting the application. On the whole I see no sufficient reason for holding that the lower Appellate Court exceeded the discretionary power vested in it by the law in granting the review applied for, or that the reasons assigned by it for its final decision are insufficient in law. I would, therefore, dismiss the appeal with costs.

* *Appeal dismissed.*

NOTES.

[The corresponding provision in the Civil Procedure Code, 1908, is Or. 47, r. 1.]

[1 All. 366]

APPELLATE CIVIL.

The 10th February, 1877.

PRESENT:

SIR ROBERT STUART, Kt., CHIEF JUSTICE, AND MR. JUSTICE OLDFIELD.

Bisheshur Singh.....Plaintiff

versus

Musammat Sugundhi.....Defendant.*

Act XVIII of 1873, ss. 93, 189, 191—Appeal to Judge—Proprietary right—Rent—Revenue Sub-proprietor—Settlement.

Where the defendant pleaded in answer to plaintiff's suit for arrears of rent that defendant no longer held as tenant but as sub-proprietor under settlement made direct with defendant by settlement officer, *held* that under s. 189 of Act XVIII of 1873 the suit involved a question of proprietary title, and that an appeal lay to the Judge of the District, although the amount in suit was less than Rs. 100.

[367] THIS was a suit to recover arrears of rent for the kharif of 1283 Fasli under s. 93 of Act XVIII of 1873, on the strength of a decree passed by the High Court in a previous suit between the parties. The defendant pleaded that since the date of that decree there had been a sub-settlement made by the settlement officer for the revenue of the land in dispute, direct with the defendant, of whose malikana holding the land formed part, and that, therefore, there could be no liability for rent to the plaintiff. The Assistant Collector decreed the claim, but on appeal by the defendant, the Collector of Fatehpur reversed the Assistant Collector's decision, holding that defendant could not be made liable, as tenant to plaintiff, for rent, since defendant's status as a sub-proprietor had been definitely determined by the settlement officer, and revenue became payable to the plaintiff, as lambardar, on land previously not assessed. The Collector further held that plaintiff's remedy lay in an application for revision of the settlement proceedings.

The Judge of Cawnpore, on appeal by plaintiff, ruled that as the Collector considered the defendant's status had been definitely determined and the value of the suit being less than Rs. 100, no appeal lay to the Judge under s. 189 of Act XVIII of 1873.

A division bench of the High Court, in special appeal by the plaintiff, reversed the decision of the Judge in the following judgments, which ruled that the suit involved a question of proprietary title, and that therefore an appeal did lie to the Judge.

Lala Lalta Prasad for appellant.

* Special Appeal, No. 1271 of 1876, from a decree of S. S. Melville, Esq., Judge of Cawnpore, dated the 8th August 1876, affirming a decree of G. L. Lang, Esq., Collector of Fatehpur, dated the 3rd May 1876.

Pandit Ajudhia Nath and the Junior Government Pleader (Babu Dwarka Nath Banarji) for Respondent.

Stuart, C.J.—In this case I am clear that there is a question of proprietary title within the meaning of ss. 93 and 189, Act XVIII of 1873, and that the Judge was bound to hear and determine the appeal to him, and that being so, this special appeal was under s. 191 of the same Act competently preferred. The suit is to recover Rs 5 on account of arrears of rent, and in defence defendant asserts a sub-proprietary right in respect of which a sub-settlement was made with her for revenue, and that she is not a tenant liable to pay rent. Thus a question of title is directly raised, and it is unnecessary to say more. We therefore allow [368] this appeal, reverse the order of the Judge, and remand this case for disposal on the merits under s. 351 of Act VIII of 1859. Costs to abide the result.

Oldfield, J.—The first and second pleas in appeal are valid. The plaintiff sues defendant as a tenant for the recovery of arrears of rent, and the defendant pleaded that she held the land as a proprietor subject to the payment of revenue but not of rent. The Collector decided that the settlement officer had determined that she was a sub-proprietor liable for revenue, and he held that this decision of the settlement officer was final and binding until set aside, and he therefore dismissed the suit. The settlement officer has thus in this suit determined the proprietary title of the defendant on the basis of the settlement officer's order. His decision in *this suit* is not the less a decision of proprietary title, because another Court may have already in another case decided the same. His decision no doubt is one of fact, whether the settlement officer has made any such order, but it involves for the purposes of this suit a decision of title when it determines the effect of the settlement officer's order on a title. It is possible that the order may have been wrongly interpreted, or is not binding, though I offer no opinion on this point. An appeal will therefore lie to the Judge, and I would reverse the decree and remand the case under s. 351 of Act VIII of 1859, for a trial on the merits. Costs to abide the result.

Decree set aside and cause remanded.

[1 All. 368]

APPELLATE CIVIL.

The 14th March, 1877.

PRESENT :

MR. JUSTICE SPANKIE, AND MR. JUSTICE OLDFIELD.

Binda Prasad and others.....Appellants

*versus.*Ahmad Ali and another.....Respondents.¹*Execution—Acquiescence.*

Certain property was attached in execution of a decree against the judgment-debtor in the year 1847. This attachment was set aside on the application of persons claiming the property as their own. These persons were sued [369] together with the judgment-debtor, by the judgment-creditor, and another decree was passed in 1855, declaring the said property liable to sale in execution of the decree of 1847. The decree of 1847 had been satisfied in part in execution proceedings taken under the decree of 1855 against the heir of the judgment-debtor. Held, that the balance of the decree of 1847 could not be recovered in execution under the decree of 1855, against the heirs of the judgment-debtor, and that no acquiescence in the past on the part of the judgment-debtor under the decree of 1847 could render such execution valid.

THIS was a miscellaneous special appeal to the High Court arising out of the following circumstances. In the year 1847 one Fakira Ram obtained a money-decree against Sheo Din Rai, the father of the appellants objectors in the present execution proceedings. Fakira Ram having sold that decree to Abdul Hayi, the ancestor of the respondents decree-holders, the said Abdul Hayi in execution of the decree of 1847, caused certain landed property to be attached and advertised for sale, as the property of Sheo Din Rai. Musammats Myna Kuar and Gulab Kuar preferred objections to this attachment, claiming the said property under an arbitration award. The objections were allowed and the property released from attachment. The decree-holder, Abdul Hayi, subsequently brought a regular suit against the said objectors and Sheo Din Rai, claiming to have the property released brought to sale in execution of the decree of 1847, on which a balance of Rs. 1,200 remained due. The decree in this suit, dated the 28th March 1855, declared the property liable to sale in satisfaction of the said balance, but exempted Sheo Din Rai from costs and interest on the ground that he had been no contesting party, either in the execution proceedings, or in the regular suit. The said decree of 1855 had erroneously continued in execution by the representatives of the decree-holder, Abdul Hayi, against the heirs of the judgment-debtor, Sheo Din Rai, at various periods from the year 1855, down to the last application for execution on the 23rd November 1875, when execution was sought for a balance of Rs. 5,865-11-11, alleged to be still due on the said decree. The heirs of the judgment-debtor filed objections on the 9th May 1876 to this last application

* Miscellaneous Special Appeal, No. 76 of 1876, from an order of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 4th November 1876.

for execution, pleading that the decree of 1847, and not the one of 1855, was the decree under which alone the objectors could be made liable, inasmuch as the decree of 1855 was limited to the declaration of the decree-holder's right to bring to sale the property claimed by persons other than Sheo Din Rai, and that Sheo Din Rai was expressly declared not liable to costs and interest under the said decree, and that execution of the decree of 1847 was barred by limitation.

The Subordinate Judge of Cawnpore disallowed the above objections, except with respect to the item of costs on the decree of 1855, which, by the Subordinate Judge's order, were declared not recoverable from the objectors. On appeal by the objectors, the Judge held that the objections were nominal, and that the previous applications for execution of the decree of 1855 having been resisted on grounds other than the present, which had been overruled by the High Court, it was not competent to the judgment-debtors to raise new pleas against the said execution.

The appeal was accordingly dismissed, and the heirs of the original judgment-debtor filed a special appeal in the High Court on the grounds that execution of the decree of 1847 was barred by limitation, that the decree of 1855 was neither against the special appellants nor their ancestor, and that the appellants were not precluded from raising the present objections by their omission to raise the pleas in previous stages of execution.

Lala Lalta Prasad for Appellant.

Pandit Bishambher Nath for Respondent.

Judgment:—The respondents are the holders of a decree dated the 28th March 1855, and have applied for its execution against the appellants who are the representatives of one Sheo Din Rai by realization of Rs. 5,865-11-11, from the judgment-debtor's property.

It appears to us that the objection taken by the appellants is valid, that the respondents cannot recover the money under this decree from appellants.

There was a decree dated 9th June 1847 against Sheo Din Rai for a sum of money, and in its execution certain ladies objected to the sale of certain property, claiming it in their own right.

The decree-holder in consequence brought a suit against them and the judgment-debtor, Sheo Din Rai, and it was in this [371] suit that the decree dated 28th March 1855, which is now in execution, was made.

The object of that suit was to have certain property claimed by the ladies declared liable to sale in execution of the decree of 1847, and if the judgment and decree be examined it will be seen that the claim was only decreed against the ladies, and the decree was in effect a declaration that the property was not the property of the ladies, and so far as their claim to it was concerned, it was liable to satisfy the decree of 1847. The decree-holder cannot realize the balance of the decree of 1847 under the decree of 1855, by executing it against those who are the judgment-debtors under the former decree, but this is what he has been doing. The balance still due on the decree of 1847 can only be recovered in execution of that decree, and it is no answer to the objection that respondent has on previous occasions taken out execution in the same way without opposition on the part of the appellants. There has been a grave illegality which no acquiescence in the past can justify.

We decree the appeal and set aside the orders of the lower Courts with costs.

Appeal allowed.

[1 All. 371]

APPELLATE CIVIL.

The 14th March, 1877.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR. JUSTICE TURNER.

Mussamat Jagesri Kuar... Plaintiff

versus

Ram Nath Bhagat and another..... Defendants.*

Declaratory decree—Suit by Reversioner.

The plaintiff's mother was entitled to certain property for her life under award, under which the plaintiff was entitled to succeed to the property after her mother's death. The plaintiff sued her mother and the holder of a decree, in execution of which the property had been sold, praying for a declaration of her right to succeed to the property, and that the said decree and sale might be declared void against her; alleging that the decree had been obtained and executed by collusion between the defendants. Held that the suit could be maintained under the exception in the judgment of the Privy Council in *Stimathoo Moothoo Vija Ragoondah Rani Kolandapuri Natchiar alias Kattama Natchiar v. Dorasinga Tevar alias Gowry Vallaba Tevar* (15 B. L. R. 88.)

[372] THE plaintiff in this case, the daughter of one Ganga Debey, sued to have her right declared to certain paternal ancestral gaundadary property, and to have a decree of the 21st August 1863, and the auction sale of a four-anna share of the above property, in execution of the said decree, declared void against her by reason of collusion and fraud between the defendant Ram Nath Bhagat, the holder of the alleged collusive decree, and the auction-purchaser of the said property and defendant Anjora Kuar, mother of the plaintiff. The latter defendant was entitled to the said four anna share during her lifetime, under an arbitration award which reserved plaintiff's right as daughter to succeed to the said property on the death of her mother. The Subordinate Judge of Ghazipur decreed the suit, finding distinctly the existence of fraud and collusion between the two defendants on the issues of fact framed in the case. The first defendant, the decree-holder, appealed from the said decree to the Judge of Ghazipur. The Judge, without deciding the case on the merits, held on the strength of rulings of Her Majesty's Privy Council† that, inasmuch

* Special Appeal, No. 1469 of 1876, from a decree of J. W. Power, Esq., Judge of Ghazipur, dated the 25th November 1876, reversing a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Ghazipur, dated the 11th January 1876.

† *Sree Ncrain Mitter v. Sreemutti Kishen Soondery Dassee*, 11 B. L. R., 171; *Stimathoo Moothoo Vija Ragoondah Ranees Kolandapuree Natchiar alias Kattama Natchiar v. Dorasinga Tevar alias Gowry Vallaba Tevar*, 15 B. L. R., 88.

as the plaintiff's suit did not involve any right to consequential relief, such a suit could not be maintained during the lifetime of the widow, and the Judge accordingly dismissed the suit. The High Court over-ruled the Judge as to the effect of the latest ruling of the Privy Council and remanded the case under s. 351 of Act VIII of 1879, for trial.

Munshi *Sukh Ram* for appellant.

Pandit *Ajudhia Nath*, Lala *Lalta Prasad*, and Pandit *Anandi Lal* for respondents.

The following Judgment was delivered by the Court :—

We are of opinion that the present suit is maintainable. The Lords of the Privy Council* expressly except the case of a [378] suit brought by a Hindu reversioner from the operation of the general rule.

The appeal is decreed and the suit remanded under s. 351 for trial. Costs of the appeal to abide and follow the result.

Appeal decreed and cause remanded.

[**1 All. 378]**

APPELLATE CIVIL.

The 20th March, 1877.

PRESENT:

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND
MR. JUSTICE OLDFIELD.

Akbar khan and others.....Plaintiffs

versus

Sheoratan and others.....Defendants.[†]

Regulation VII of 1822, s. 9, cl. i—Act XIX of 1873, s. 66—cesses—Civil Court—Suit for declaration of zamindari rights to cesses.

Notwithstanding that zamindari cesses cannot be collected until recognized and sanctioned by the Settlement authorities, there is nothing in Regulation VII of 1822 or Act XIX of 1873 to preclude a Civil Court from taking cognizance of suits seeking a declaration of zamindari rights to such cesses.

THE plaintiffs sued for a declaration of their rights as zamindars to half the fruit and timber of certain groves, which they alleged they were entitled by

* *Strimathoo Moonhoo Vijia Ragoonadah Ranee Kolandapuree Natchiar alias Kattama Natchiar v. Dorasinga Tevar alias Gowry Vallaba Tevar.* 15, B. L. R., 88.

The portion of that Judgment of their Lordships referred to here was as follows :—

"The arguments now under consideration are founded on the right of a reversioner to bring a suit to restrain a widow or other Hindu female in possession from acts of waste, although his interest during her life is future and contingent. Suits of the kind form a very special class and have been entertained by the Courts *ex-necessitate rei.*"

† Special Appeal, No. 748 of 1876, from a decree of R.F. Saunders, Esq., Judge of Azamgarh, dated the 18th March 1876, reversing a decree of Maulvi Sakhawat Ali, Officiating Munsif of Azamgarh, dated the 8th December 1875. "

ancient custom to receive. The Officiating Munsif of Azamgarh found in favour of the existence of the custom and decreed the suit.

The Judge, on appeal by the defendants, held that s. 66 read in connection with preceding sections of Act XIX of 1873 was a bar to civil suits seeking to establish rights to cesses, unless such rights had been recorded by the Settlement Officer; and the Judge, without entering into the question of existence of the alleged custom, dismissed the suit on the ground that the Settlement Officer had not recorded the existence of such rights.

The High Court remanded the case under s. 354 of Act VIII of 1859, over-ruling the Judge as to the inadmissibility of the suit in the following order :—

Mr. Colvin and Munshi Hunuman Prasad for Appellant.

Pandit Ajudhia Nath and Mir Akbar Husain for Respondent.

[374] Order.—It has been held by this Court (H. C. R., N.-W. P., 1870, p. 425), that a Civil Court is not precluded by the terms of Regulation VIII of 1822, s. 9, cl. i, from enquiring into and declaring a right on the part of the zamindar to cesses and collections, although not avowed and sanctioned, nor taken into account in fixing the Government jama at the time of settlement, notwithstanding that until so avowed and sanctioned they cannot be collected by the zamindar, and there is nothing in the terms of s. 66 of Act XIX of 1873 to a contrary effect. The plaintiffs claim the right and the cess on the old custom, and this question of custom, which has not been distinctly determined, must be tried by the Lower Appellate Court.

We remand the case for this purpose under s. 354 of Act VIII of 1859, and allow seven days for filing objections to the finding.

The Judge's finding on remand having been in favour of the plaintiff's right and confirmatory of the alleged custom, the High Court decreed the appeal in the following judgment :—

We accept the finding of the Lower Appellate Court, to which no objections have been preferred, and reverse the decree of the Lower Appellate Court and restore that of the Court of first instance and decree this appeal with costs.

Appeal allowed.

[1 All. 374]

APPELLATE CIVIL.

The 20th March, 1877.

PRESENT :

MR. JUSTICE SPANKIE, AND MR. JUSTICE OLDFIELD.

Sukhai.....Defendant

versus

Daryai.....Plaintiff.*

Act VIII of 1859, ss. 256, 257—Act XXIII of 1861, ss. 11, 35—Auction-sale—Order cancelling sale—Appeal—Suit to set aside.

A Munsif having cancelled an auction-sale of landed property on the sole objection of the judgment-debtor that the property realized a low price and the Judge having dismissed the auction-purchaser's appeal from the said [375] order on the ground that the Munsif had no authority to cancel the sale under the terms of s. 257 of Act VIII of 1859, without some irregularity in conducting or publishing the sale being proved, and that the said order must therefore be taken to have been passed under s. 11, Act XXIII of 1861, which admits of no appeal by the auction-purchaser who was no party to the execution proceedings. *Held*, that such order passed by the Munsif was not a proceeding under s. 11 of Act XXIII of 1861, but an order passed *ultra vires* under s. 257 of Act VIII of 1859, and that a suit would lie for its cancellation, the finality of an order under ss. 256 and 257 of Act VIII of 1859 depending on its compliance with the terms of those sections.

THE plaintiff sued for confirmation of an auction-sale and establishment of plaintiff's right of purchase of a third share of a five biswa zamindari property, and for the setting aside of the orders passed on the miscellaneous side by the Munsif and the Judge, by which the said auction-sale was declared cancelled.

The orders on the miscellaneous side referred to were passed on an objection preferred by the judgment-debtor in the Munsif's Court to the effect that the property had been sold for an inadequate price. The Munsif held this to be sufficient cause for cancelling the auction-sale. The auction-purchaser appealed to the Judge, who admitted the invalidity of the Munsif's order cancelling the sale, but ruled that, inasmuch as the Munsif's order was passed under s. 11 of Act XXIII of 1861 and not under s. 257 of Act VIII of 1859, under which the Munsif assumed that he was acting, no appeal would lie on the part of an auction-purchaser who was no party to the decree in execution. The Judge accordingly dismissed the appeal on the miscellaneous side, and the auction-purchaser brought the suit. The Munsif of Kaimganj dismissed the suit on the ground that his order on the miscellaneous side was final under s. 257 of Act VIII of 1859, and that under s. 11 of Act XXIII of 1861, no suit would lie for setting aside such orders passed in execution of a decree; and further, that the auction-purchaser's right only accrues after the sale has been sanctioned and completed, and that therefore, under s. 32 of Act VIII of 1859, the suit could not be heard, as no right had accrued to the plaintiff. The

* Special Appeal, No. 25 of 1877, from a decree of Pandit Har Sahai, Subordinate Judge of Farukhabad, dated the 4th November 1876, reversing a decree of Maulvi Wajid Ali, Munsif of Kaimganj, dated the 11th July 1876.

Subordinate Judge, on appeal by the plaintiff, reversed the Munsif's decision, holding that the Munsif had no power under the terms of ss. 256 and 257 of Act VIII of 1859 to cancel the sale by reason of mere inadequacy of price, and without any irregularity in conducting [376] or publishing the sale alleged by the judgment-debtor, who sought to set it aside; that, consequently, as no valid final order had been passed by the Munsif under ss. 256 and 257, his order must be taken to have been passed under s. 11 of Act XXIII of 1861, and that the suit was maintainable. The Subordinate Judge decreed the plaintiff's appeal. The defendant in special appeal to the High Court impugned the Appellate Court's decision on the ground that the order passed on the miscellaneous side, setting aside the sale, was final, and that no suit would lie for its cancellation.

Babu Barodha Prasad for Appellant.

Munshis Sukh Ram and Kashi Prasad for Respondent.

Judgment.—If this matter rested solely on the plea in special appeal there would be no difficulty in disposing of the case. For if the first Court's order in execution of decree setting aside the sale was final, there could have been no appeal to the Judge, and any order made by him might have been cancelled under s. 35 of Act XXIII of 1861. But here the order made by the Munsif setting aside the sale was not one that could be legally made under s. 257 of Act VIII of 1859, since no material irregularity in publishing or conducting the sale and consequent substantial injury to the objector, by reason of the irregularity, were established. The Munsif's order, therefore, setting aside the sale, because the sale price was inadequate, no material irregularity being proved, was in excess of the power granted to him by the section. But it was certainly not an order made, as the District Judge assumed in miscellaneous appeal, under s. 11 of Act XXIII of 1861, because there was no question arising between the parties to the suit which the Munsif was called upon to dispose of when he made his order. If it had been such a question, there could have been no separate suit. But here the auction-purchaser having fulfilled all the conditions of the sale, calls for confirmation, which is refused on no legal ground by the Court executing the decree. He had bought the property, and all that was wanting was a confirmation of his title. If no application of a legal character was made to set aside the sale, the Court executing the decree, to use the words of the section, *shall* confirm the sale. As in this case no objection permissible by s. 256 had been made, the Court executing the [377] decree was absolutely bound to confirm the sale, and as it did not do so but acted in excess of its jurisdiction in refusing to do so, and in cancelling it, it appears that the suit will lie. We are justified in this opinion by a decision of a Division Bench of this Court of the present appeal, No. 1437 of 1876, decided on the 13th March of the present year. * We, therefore affirm the

* In this case the plaintiff sued to establish his right as auction-purchaser to, and to obtain possession of, the property sold by auction, by setting aside the orders passed on the miscellaneous side by the first and Appellate Courts which cancelled the said auction sale. The plaintiff added a claim to obtain mesne profits from date of sale to date of possession.

The Lower Courts having on insufficient grounds assumed fraud in the auction sale by reason of inadequacy of price and other irrelevant circumstances, and having held that the orders passed on the miscellaneous side under ss. 256 and 257 of Act VIII of 1859, precluded a fresh suit to establish the auction-purchaser's right to the property, sale of which was

judgment of the Lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[As to when suit lies at the instance of the auction-purchaser, see also (1880) 3 All. 206 ; (1899) 3 C. W. N. 99.]

[1 All. 377]

APPELLATE CIVIL.

The 24th March, 1877.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR. JUSTICE OLDFIELD.

Ramanand.....Judgment-debtor, Appellant
versus

The Bank of Bengal.....Decree-holder, Respondent.[†]

*Act VIII of 1859, s. 273—Act XX of 1866, s. 52—Act VIII of 1871, ss. 53, 54,
55—Appeal—Execution—Procedure—Repeal.*

No appeal lies against orders passed in execution of decrees under Act XX of 1866, the procedure under that Act having been expressly saved by Act VIII of 1871, which repealed Act XX of 1866.

THE judgment-debtor appellant filed the above miscellaneous appeal from an order of the Subordinate Judge of Cawnpore under [378] s. 273 of Act VIII of 1859, alleging that execution of the decree passed under Act XX of 1866 was barred by limitation according to the provisions of cl. 166, sch. iii, Act VIII of 1871, and that, on the facts established by the record, the appellant was entitled to his discharge from prison, the decree-holder having failed to show that appellant was possessed of any property.

Babu Dwarka Nath Mukerji and Shah Asad Ali for Appellant.

Messrs. Hill and Greenway for Respondent.

Judgment:—This is a miscellaneous regular appeal from an order made by the Subordinate Judge of Cawnpore in execution of a decree, and a preliminary objection is taken by the respondent's counsel that the appeal cannot be heard inasmuch as no appeal lies from such an order.

annulled, the High Court (PEARSON and TURNER, JJ.) remanded the case for trial on the merits in a judgment of which the following extract is the material portion :—

"The order passed by the Munsif on the 10th March 1875, setting aside the sale, and that passed by the Judge on the appeal from it on the 5th June 1875, did not, it would seem, proceed on the ground of any material irregularity in publishing or conducting the sale, and cannot, therefore, in reference to the provisions of s. 257 of Act VIII of 1859 bar the present suit, which the plaintiff is entitled to have tried on the merits. He cannot indeed obtain in this suit all the relief he asks for; but if he should succeed in showing that the sale made to him was a valid one which should have been confirmed, he would be entitled to a decree annulling the order abovementioned, and declaring his right to obtain from the Munsif an order confirming the sale, a certificate of the nature described in s. 259, and delivery of the property which was the subject of the sale in the manner provided by s. 263 or s. 264 of Act VIII of 1859."

[†] Miscellaneous Regular Appeal, No. 75 of 1876, from an order of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 4th November 1876.

The circumstances appear to be these. The judgment-debtor, being indebted to the Bank of Bengal in a very considerable sum, upwards of Rs. 76,000, made an agreement for the liquidation of the debt under s. 52 of Act XX of 1866* which agreement was duly registered. It is here to be observed that although that Act was repealed by Act VIII of 1871, the procedure for such cases as the present is thereby expressly saved and is provided by the subsequent ss. 53, 54 and 55 of the Act. Under s. 53 of that Act the Bank obtained a decree against the judgment-debtor, and as that section provides that such a decree may be enforced forthwith under the provisions for the enforcement of decrees contained in the Code of Civil Procedure, he was arrested under a warrant issued pursuant to s. 273 of Act VIII of 1859† in execution of the decree, and on the 23rd of October 1876, he applied for his discharge under s. 8 of Act XXIII of 1861‡. Subsequently the Bank were called upon to show cause, on the 4th November 1876, why they should not proceed against their judgment-debtor's property and he himself be discharged, and such cause having been shown to the satisfaction of the Court, the judgment-debtor's application was refused, and he himself sent back to prison. Against this order, the present appeal has been preferred.

*[Sec. 52:—Whenever the obligor and obligee of an obligation shall agree that in the event of the obligation not being duly satisfied, the amount secured

Record of agreement that amount secured by an obligation may be recovered thereby may be recovered in a summary way, and shall at the time of registering the said obligation apply to the Registering Officer to record the said agreement, the Registering Officer, after making such enquiries as he may think proper shall record such agreement at the foot of the endorsement and certificate required

by Secs. 66, and 68, and such record shall be signed by him and by the obligor, and shall be copied into the Register Book No. 1 or No. 6, as the case may be, and shall be *prima facie* evidence of the said agreement.]

†[Sec. 273:—Any person arrested under a warrant in execution of a decree for money may, on being brought before the Court, apply for his discharge on the ground that he has no present means of paying the debt, either wholly, or in part, or, if possessed of any property, that he is willing to place whatever property he possesses at the disposal of the Court. The application shall contain a full account of all property, of whatever nature belonging to the applicant, whether in expectancy or in possession, and whether held exclusively by himself or jointly with others, or by others in trust for him (except the necessary wearing apparel of himself and his family and necessary implements of his trade), and of the places respectively where such property is to be found, or shall state that with the exception above mentioned,

Form of application. Verification. the applicant is not possessed of any property and the application shall be subscribed and verified by the applicant in the manner hereinbefore prescribed for subscribing and verifying plaints. [Amended and supplemented by Act XXIII, 1861, s. 8.]

‡[Sec. 8 :—When a person arrested under a warrant in execution of a decree for money shall, on being brought before the Court, apply for his discharge on either of the grounds mentioned in Section 273 of Act VIII of 1859, the Court shall examine the applicant in the presence of the plaintiff or his pleader, as to his then circumstances, and as to his future means of payment, and shall call upon the plaintiff to show cause why he does not proceed against the defendant is possessed, and why the defendant should not be discharged; and should the plaintiff fail to show such cause, the Court may direct the discharge of the defendant from custody. Pending any enquiry which the Court may consider it necessary to make into the allegations of either party, the Court may leave the defendant in the custody of the Officer of the Court to whom the service of the warrant was entrusted, on the defendant depositing the fees of such Officer, which shall be at the same time daily rate as the lowest rate charged in the same Court for serving process; or if the defendant furnish good and sufficient security for his appearance at any time when called upon while such enquiry is being made, his surety or sureties undertaking in default of such appearance to pay the amount mentioned in the warrant, the Court may release the defendant on such security.]

S. 55 of the⁵ Act of 1866 expressly provides that "there shall be no appeal against any decree or order made under ss. 53, [379] 54, or this section." It would thus appear that the preliminary objection taken at the hearing of this appeal was well founded. The respondent's counsel in support of his objection referred to two Calcutta cases respectively (*Petition of Pearee Lal Sahoo*, 7 W. R. 130; 17 W. R. 512). But to my mind the law is too clear to admit of any doubt on the subject, and it is quite unnecessary to refer to any other rulings. The objection is, therefore, allowed, and the appeal is dismissed with costs.

Oldfield, J.—I concur in the proposed order.

Appeal dismissed.

NOTES.

[This case was overruled in (1878) 1 All. 583.]

[1 All. 379]

JURISDICTION AS COURT OF REVISION.

The 23rd April, 1877.

PRESENT :

MR. JUSTICE SPANKIE.

The Empress of India

versus

Rameshar Rai.

Act XLV of 1860 (Indian Penal Code), ss. 192, 193, and 414—Fabricating false evidence—Voluntarily assisting in concealing stolen property—Act X of 1872 (Criminal Procedure Code), s. 297—Separate offences.

Where the petitioner was convicted of having voluntarily assisted in concealing stolen railway pins in a certain person's house and field, with a view to having such innocent person punished as an offender, held, that the Magistrate was right in convicting and punishing the petitioner for the two separate offences of fabricating false evidence for use in a stage of a judicial proceeding under s. 193 of the Indian Penal Code, and of voluntarily assisting in concealing stolen property under s. 444, Indian Penal Code.

MR. A. E. C. CASEY, Assistant Magistrate of the first class, stationed at Ghazipur, convicted a zamindar, Rameshar Rai, of having employed one Musammat Bhagi Bindin to secrete stolen railway pins in the godown and fields of Rameshar Rai's enemy Sedari, for the purpose of implicating the said Sedari as the thief.

The Assistant Magistrate convicted Rameshar Rai of fabricating false evidence for the purpose of being used in a stage of a judicial proceeding, and under s. 193, Indian Panal Code, sentenced Rameshar Rai to two years' rigorous imprisonment and to pay a fine of Rs. 50, or in default, to be further rigorously imprisoned for six months, and on the same facts the Assistant Magistrate found Rameshar Rai guilty of the additional offence of voluntarily assisting in concealing stolen property, and sentenced him under s. 414 [380] Indian Penal Code, to a further term of two years' rigorous imprisonment and to pay a fine of Rs. 50, or in default, to be rigorously imprisoned for an additional term of six months, the second sentence to commence on expiration of the first.

Rameshar Rai's appeal to the Judge of Gaziphur having been dismissed on the merits, the prisoner applied to the High Court under s. 297 of the Code of Criminal Procedure, to revise the above sentences on the ground that on the facts found but one offence had been committed, and that the conviction of the prisoner for separate offences, under ss. 193 and 414, of the Indian Penal Code was illegal.

Mr. Colvin for the Petitioner.

The Court (SPANKIE, J.) delivered the following Judgment :—

It is admitted that the pins were stolen property. It was brought home to the prisoner, Rameshar Rai, that he had voluntarily assisted in concealing, or disposing of or making away with this property which he knew, or had reason to believe, to be stolen property, and he was punished for this offence. He also is found to have concealed the property in the field of one Sedari, an enemy of his own, with a view that it might be found in his (Sedari's) house and field, and that he might be apprehended and charged with the theft. There is also a strong presumption that he instigated one Bhagi to conceal pins in Sedari's house. It is argued that if the disposal of the property was committed with the object of placing it, or causing to be placed, in Sedari's field to bring him into trouble, one offence only and not two distinct offences were committed. But I cannot accept this view of the case. It may be that the Magistrate was of opinion that there was not sufficient evidence to show that the offence fell under s. 411, *viz.*, that there was a dishonest receiving of stolen property within the meaning of the word "dishonesty"** as defined in the Penal Code. He therefore applied s. 414. In the commission of an offence under this section, it is sufficient that the accused be proved to have voluntarily assisted in concealing, disposing of, or making away, with property, which he knew, or had reason to believe, was stolen property. The fact that he did so, [381] convicts him of an offence against property under chapter xvii of the Penal Code. He may then, or at the time, have entertained the idea that by placing it where he did, he would cause evidence to be found whereby he hoped that Sedari might be convicted of the theft of the property so concealed by him. But he nevertheless committed an offence under s. 414 of the Code against the property. Also he fulfilled the condition of the offence as defined in that section. It did not matter where he concealed it. He should not have concealed it at all, or caused it to be concealed voluntarily, either in Sedari's house or land, or elsewhere, if he knew or had reason to believe that it was stolen property.

In concealing it as he did in Sedari's field, with the intention found by the Magistrate, the prisoner committed another and distinct offence against public justice under chapter xi of the Penal Code, as he intentionally fabricated false evidence to be used in a judicial proceeding. He was punished under s. 193. The offence possibly was one more nearly coming under s. 195 of the Penal Code. There could be no doubt that in hiding the pins in Sedari's field intending that they might be found and that the circumstance of their being found in Sedari's field might appear in a judicial proceeding, and that this circumstance might lead the Magistrate to believe that he, Sedari, had been connected with the theft, under s. 192 would be and is fabricating false evidence, and is a distinct offence from the offence of voluntarily assisting in disposing of the stolen property. I see no reason to interfere, and dismiss the petition.

Petition dismissed.

* "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly."

[1 ALL. 381]

FULL BENCH.

The 12th April, 1877.

PRESENT :

SIR ROBERT STUART, Kt., CHIEF JUSTICE, MR. JUSTICE PEARSON,
 MR. JUSTICE TURNER, MR. JUSTICE SPANKIE, AND MR. JUSTICE OLDFIELD.

Badri Prasad.....Plaintiff

versus

Muhammad Yusuf and another.....Defendants.*

Adjudication of right—Binding on parties to proceedings—Act VIII of 1859, s. 246—Claimant—Conclusive order—Defendant in possession—Limitation—Objector—Suit to establish right—Title.

[382] In a suit brought by plaintiff to establish his right as auction-purchaser to certain immoveable property sold in execution of a decree, under the provisions of s. 246 of Act VIII of 1859, disallowing the claim of the objector—represented by the defendant—and adjudging the property attached to be that of the judgment-debtor, represented by the plaintiff—the said order not having been set aside in a regular suit by the defendant. Held (by a majority of the Full Court) that an order passed under the provisions of s. 246 of Act VIII of 1859, unless over-ruled in a regular suit brought within the statutory period, is binding on all persons who are parties to it, and is conclusive.

PEARSON J. *per contra*, s. 246 of Act VIII of 1859 provides for an adjudication of proprietary right on the basis of possession, but the matter is not "*res judicata*" as to matters in dispute between decree-holder and claimant, unless the party against whom an order is passed under s. 246 of Act VIII of 1859 fails to bring a regular suit to establish his right. In the case mentioned in the order of reference as apparently conflicting with the above view, there had been no adjudication on the basis of possession by the Court passing an order under s. 246 of Act VIII of 1859, and the defendant in possession was therefore, at liberty to assert his proprietary title against the lien set up by plaintiff under the said order passed without jurisdiction on the miscellaneous side.

THE following are the matters of fact out of which the Full Bench ruling in this case arises. On the 8th March 1866, one Imam-ud-din got his name entered in the revenue records as half sharer of a grove near Aligarh, one Rahim Bakhsh claiming to be the other half sharer.

Subsequently Imam-ud-din's right to a half share of the grove was attached, and upon this attachment Rahim Bakhsh appeared as an objector under s. 246 of Act VIII of 1859, claiming the whole interest in the grove, and repudiating Imam-ud-din's right to, or possession of, any portion of the property.

The Munsif of Aligarh on the 30th April 1870, under s. 246 of Act VIII of 1859, disallowed Rahim Bakhsh's claim to the share of Imam-ud-din, in an order, of which the following is a translation.

* Special Appeal, No. 423 of 1876 from a decree of H. M. Chase, Esq., Judge of Aligarh, dated the 8th March 1876, reversing a decree of Munshi Kishen Dyal, Munsif of Aligarh, dated the 22nd June 1875.

"Whereas the Patwari has submitted the Nikasi papers of the year 1273 Fasli, wherein the name of Imam-ud-din, son of Man-ul-la appears, though not very clearly, and whereas in support thereof it is proved by copies of documents, and the parol evidence of the Patwari, that the judgment-debtor, as representative of Man-ul-la, hold possession of half the grove in dispute which is under attachment; it is ordered that the claim preferred in respect to the matter in dispute be disallowed with costs to be borne by the objector."

[383] The said share was, on the 30th May 1870, put up to sale and purchased by Badri Prasad, present plaintiff, and the auction-purchaser was put in possession, after confirmation of the sale, on the 4th July 1870.

Subsequently, Rahim Bakhsh's alleged rights in the whole grove were attached in execution of another decree. The said rights were, on the 19th July 1870, purchased at a court sale by the defendants, who were put in possession on the 25 February 1871. On the 20th September following, the plaintiff, Badri Prasad, petitioned the Munsif's Court, pointing out that he had been put in possession as auction-purchaser of Imam-ud-din's share in the grove under a Court certificate, and urging that, therefore, the defendants as subsequent auction purchasers of Rahim Bakhsh's alleged rights in the whole grove ought not to be certified to hold possession under the said sale of more than half the grove, or what constituted Rahim Bakhsh's real rights therein. The Munsif passed an order on the said petition, recording that Badri Prasad's possession by right of purchase of Imam-ud-din's share, prior to sale of Rahim Bakhsh's interests, could in no wise be affected by the purchase made of the alleged rights of Rahim Bakhsh. The defendants, having realized the rent of the grove, succeeded in getting the Settlement Officer, on the 26th May 1874, to record their actual possession over the whole grove, qualifying the defendant's possession as to half by the mention that it was held on behalf of Badri Prasad, who was referred to the Civil Court to obtain enjoyment of his right.

Badri Prasad, accordingly, sued in the Munsif's Court to establish his right, among other things, to possession of half of three bighas out of the four bighas and six biswas, the area of the grove. The defendants pleaded in answer to the suit that the whole estate was owned and possessed by Rahim Bakhsh and sold in execution of the decree obtained against him, that defendants being the auction-purchasers under that decree, the plaintiff could not succeed in disturbing defendants' possession without suing to set aside the said auction sale, and that such suit would be barred by limitation, more than a year having elapsed between the date of auction sale and date of suit; that the suit was also beyond time by reason of Imam-ud-din's [384] never having had any interest in, or possession of, the property, and finally that the order of the 30th April 1870 was neither binding on defendants nor conclusive, because it was based on mere entries in revenue records without regard to actual possession, and because defendants had obtained possession of the whole rights purchased before the said order had become final. The Munsif held that the order was final and conclusive, unless set aside in a regular suit brought within a year by Rahim Bakhsh, or his representatives, and that no such suit having been brought, it was not open to the defendants to question the adjudication of right involved in the said order as between the parties to the present suit. On the merits the Munsif found that Imam-ud-din had been in proprietary possession of half the grove, and that the plaintiff as his representative was entitled to the property in suit.

On appeal by defendants, the District Judge of Aligarh held that the plaintiff having merely purchased the alleged rights of Imam-ud-din in the land,

and having sued for a declaration of right and possession, the plaintiff was bound to prove his title to the property, which as against the defendants, who were in possession, was not conferred by the Munsif's order, the Judge allowed nevertheless that such an order on the miscellaneous side would be binding, unless reversed in a regular suit, on a party not in possession, the fact of possession constituting an exception to the rule, and the Judge accordingly decreed the defendant's appeal, and remanded the case under s. 351 of Act VIII of 1859 to the Court of First Instance for a finding as to the nature and extent of Imam-ud-din's rights, purchased by the plaintiff.

The plaintiff, thereupon, appealed to the High Court on the principal ground that the Judge had erred in his construction of the effect of an order passed under s. 246 of Act VIII of 1859 upon the rights of parties to such miscellaneous proceedings.

The Division Bench of the High Court (STUART, C.J., and TURNER, J.) referred the question contained in the subjoined order of reference to the Full Bench :—“ We are inclined to think that when a Court executing a decree has investigated a claim under s. 246 and determined it against an objector, the decision is final, and binds the objector's right, unless, within the time limited, he sues to establish his right. As such a ruling would apparently [385] conflict with the decision in special appeal No. 751 of 1874, we refer the question to the Full Bench.”

Babus Aprokash Chander Mukerji, Jogendro Nath Chaudhri, Pandit Ajnulha Nath and Lala Ramprasad for Appellant.

Messrs. Ross, Mahmud, the Junior Government Pleader (Babu Dwarka Nath Banerji), Munshi Hanuman Prasad, and Pandit Bishambhar Nath for Respondents.

The following Judgments were delivered by the Court:—

Turner, J. (STUART, C.J., SPANKIE and OLDFIELD, JJ. concurring).

The 246th section of the Code of Civil Procedure declares that when a claim is made to immoveable property attached in execution of a decree as not liable to be sold in execution of a decree against the defendant, the Court shall, subject to the proviso contained in the next succeeding section, proceed to investigate it, and if it shall appear that the property was in the possession of the party against whom execution is sought, as his own property, at the time when the property was attached, the Court shall disallow the application. This follows the clause out of which the question before the Court arises. The order which shall be passed by the Court under this section shall not be subject to appeal, but the party against whom the order may be given, shall be at liberty to bring a suit to establish his right, and the Limitation Act prescribes that such a suit must be brought within one year from the date of the order.

Two questions were principally raised at the hearing, one as to the effect of the order, the other as to the pertinency of the enquiry, whether the order was passed on a correct decision of the issue as to possession.

Now it appears to us that when an enquiry has been duly held under s. 246, and an order passed thereon, so long as the order remains unquestioned by the procedure directed in the Code, it is as final and conclusive on all persons who are parties to it as any other final order or decree of a Court of Justice. Until it [386] has been over-ruled in a regular suit, brought in virtue of the

permission expressly given by the Code, no Court is at liberty afterwards to go behind the order, and inquire whether the Court, which disallowed the objection, had correctly appreciated the evidence as to possession, or had come to the conclusion erroneously, that possession was with the judgment-debtor. Consequently, at the hearing, we expressed our opinion that it was immaterial to the determination of the question submitted to us, whether or not the Court which had investigated the claim had formed an erroneous judgment on the question of possession.

The effect of the order cannot be affected by the propriety, or otherwise, of the decision at which the Court, which investigated the claim, arrived as to the fact of possession.

We proceed, then to consider what is the effect of the order. Inasmuch as the Code declares that, in the suit brought to contest it, the claimant must prove his *right*, we understand the Legislature to have intended that the order until reversed is conclusive as to right.

It is not a novelty in Indian law that possession, which is *prima facie* evidence of title, should be accepted as justifying a record of title unless and until the record is amended in pursuance of a decree obtained in a regular suit brought within a limited time.

Thus Settlement Officers, when engaged in preparing the record of rights under Regulation VII of 1822, were directed to enquire into present or very recent possession, and to frame their record in accordance with the result of that enquiry, and if the parties affected appear before them, and an award is made, that award is final and conclusive, unless, within three years from the date of the award, the party who is aggrieved by it, institutes a regular suit to question it. We are unable to distinguish the principle on which the case cited at the argument was decided from the principle which should guide the Court in determining the point now before it. It appears not unreasonable that, to give some little security to titles which, in this country, are exposed to much peril, as titles derived from auction sales in execution of a decree, the Legislature should have required any person who makes a claim to attach property, [387] to come in within a limited time, and vindicate his rights if he have any, or thereafter to be barred from asserting them.

The argument that limitation does not apply to a defendant is not in our opinion pertinent. The question is, whether or not the defendant is not bound by an order which he did not contest within the time allowed by law. In our judgment, having failed to prove his right within that time, he is precluded from asserting it, by an order which has become final.

Pearson, J.—“The finding of the Court, under s. 246 of Act VIII of 1859, whether the attached property is in the possession of the party against whom execution of decree is sought, as his own property and not on account of any other person, or is in the possession of some other person in trust for him, or in the occupancy of ryots or cultivators or other persons paying rent to him, or whether it is not in his possession or in the possession of some other person in trust for him, or in the occupancy of ryots or cultivators paying rent to him, or that being in his possession, it is not so on his own account, or as his own property, but on account of, or in trust for, some other person, appears to me to be an adjudication of proprietary right on the basis of possession. The order which may be passed on such finding is declared not to be subject to appeal, and would not, I conceive, be contestable at all, but for the express permission which is

given by the concluding words of the section to the party against whom an order may be given to bring a suit to establish his right. Those words show that the matter in dispute between the decree-holder and the claimant is not, by reason of the finding and order under s. 246, so absolutely a *res judicata* as not to be open to re-adjudication in a suit brought by the party against whom the order was passed to establish his right. But in the event of no such suit being brought, the matter in dispute must be held to have been finally disposed of by the finding and order under s. 246, and to be absolutely a *res judicata*."

The learned Judge then distinguished the circumstances of the present case from those in special appeal No. 751 of 1874, in which as the judgment continued "there had been no adjudication on [388] the basis of possession, in respect of the proprietary right in the property, which therefore could not be regarded as a *res judicata*; while the order disallowing the claim on the ground of a lien was beyond the scope of the Munsif's jurisdiction under the section."

The DIVISION BENCH (STUART, C.J., and TURNER, J.) made the following order:—In accordance with the ruling of the majority of the Full Bench of this Court, we must allow the appeal, and reversing the decree of the lower Appellate Court restore that of the Court, of First Instance, with costs.

Decree reversed.

NOTES.

[CLAIM PROCEEDINGS ON ATTACHMENT—UNSUCCESSFUL PARTY BOUND—

(1885) 8 Mad. 506; (1897) 22 Bom. 640; (1884) 9 Bom. 35; (1893) 18 Bom. 260; (1889) 14 Bom. 372; (1893) 20 Bom. 270.

As regards mortgage decrees, *see*, (1897) 1 C. W. N., 701; (1879) 2 All. 455.

The fact that the decree is subsequently satisfied, does not make any difference:—(1878) 1 All. 541.

The persons bound are, however, only those who were parties to the proceedings:—(1896) 18 All. 418—6 A. W. N., 129; (1897) 22 Bom. 875.]

[1 All. 388]

APPELLATE CIVIL.

The 20th April, 1877.

PRESENT:

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR. JUSTICE PEARSON.

Agra Savings Bank, Limited.....Defendant

versus

Sri Ram Mittor.....Plaintiff.*

Act XXIII of 1861, s. 11—Barred suit—Excess payment made by mistake in execution of decree—Jurisdiction—Small Cause Court—Suit in nature of damages.

Where the plaintiff sued defendant in a Civil Court for recovery of a sum alleged to have been paid by plaintiff to defendant under a mistake, in excess of the sum due in satisfaction of a decree of the Small Cause Court—*Held* by STUART, C.J., PEARSON, J., dissenting, that

* Special Appeal, No. 1408 of 1876 from a decree of H. Lushington, Esq., Judge of Allahabad, dated the 6th September 1876, reversing a decree of Babu Mritonjoy Mukerji, Munsif of Allahabad, dated the 21st June 1876.

such a suit was in the nature of one for damages cognizable by the Court of Small Causes, and was not barred by the terms of s. 11 of Act XXIII of 1861, the question involved in the claim not being one which could properly arise in execution proceedings, that must be confined to matters embraced in the decree passed between the parties to the suit.

THE plaintiff in this case sued the defendant for the recovery of a sum realized by defendant in excess of the decree against plaintiff which defendant had executed in the Small Cause Court; the cause of action alleged in the plaint was the discovery by plaintiff of the mistake he had made in paying interest not provided for in the decree. The Munsif dismissed the suit on the ground [389] that it was barred by the terms of s. 11 of the Act XXIII of 1861, being a question relating to the execution of decree between the parties to the suit in which the decree was passed. On plaintiff's appeal to the Judge, the Judge decreed the appeal, holding that the question involved in the suit was not one which could be raised in execution of decree, inasmuch as questions under s. 11 of Act XXIII of 1861, must relate to matters comprised in the decree, and the decree being silent as to interest, the claim for the recovery of such amount paid under a mistake was properly brought by a suit in the Civil Court. The defendant, in special appeal before the High Court contended that the claim was of the nature of suit cognizable by the Small Cause Court, and that the Civil Court, therefore had no jurisdiction over the subject-matter of the claim, and secondly, that the plaintiff having unsuccessfully claimed the refund in the execution department under s. 11 of Act XXIII of 1861, the suit was barred.

A Division Bench of the High Court, while agreeing in their decree dismissing the suit, arrived at such conclusion on different grounds detailed in the following **judgments** delivered by the Court:—

Mr. Wollaston for Appellant.

The Junior Government Pleader (*Babu Dwarka Nath Banerji*) and Lala Ram Prasad for Respondent.

Pearson, J.—I am of opinion that the suit is barred by the provisions of s. 11 of Act XXIII of 1861. The money now claimed by the plaintiff in this suit was claimed and realized from him in execution of a decree which the defendant had obtained from the Small Cause Court. Whether it was rightly so claimable and realizable was a question to be determined by the Court executing the decree, and cannot be made the subject of a separate suit. The precedent cited * by the lower Appellate Court in support of the contrary opinion does not support it. I need not [390] discuss the other questions raised by the pleas in appeal. The appeal should in my opinion be decreed with costs, the lower Appellate Court's decree being reversed, and that of the Court of First Instance being restored.

Stuart, C.J.—The impression made upon me at the hearing of this appeal was that, contrary to my sense of justice, we were bound to hold that the suit was barred by s. 11 of Act XXIII of 1861; I say contrary to my sense of justice, for it seemed to be monstrous that the law should forbid a remedy in such a case as this when money had been paid in excess of a decree by mistake, and only because, by inadvertence or otherwise, the blunder had been omitted to be noticed in the execution department, yet the language of s. 11 seemed to me to exclude all recovery by separate suit, when it says "all questions regarding the amount of any mesne profits, which by the terms of the decree may have been reserved for adjustment in the execution of the

* 4 B. L. R., 111.—*Ekowri Singh and others versus Bijay Nath Chattapadhyaya*.

See also *Kunhi Moidin Kuttipuram versus Ramen Unni*, I. L. R., Mad. I., p. 203.

decree, or of any mesne profits or interest, which may be payable in respect of the subject-matter of a suit between the date of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit, and the question before us appeared to be one relating to a sum which had been paid in discharge, or satisfaction of the decree, or the like, and was also a question relating to the execution of a decree.

But on reconsideration, I have arrived at the conclusion that such is not a right application of s. 11 to the present case, and that, therefore, we need not do injustice in deference to a literal and arbitrary construction of that section. The provisions of s. 11, should, I think, be confined to matters within limits of, and not outside, the decree, and money paid in excess of the amount decreed is, in my opinion, a matter outside the decree.

I have looked into the records in this case, and I find that the amount due under the decree was Rs. 516-8-3, but that by mistake the amount actually recovered was Rs. 592-11-0, the difference in [391] excess, Rs. 76-2-9, being the sum now sued for. These figures do not appear to be disputed, and they show that Rs. 76-2-9 not only never formed any portion of the decree, but could in no construction of it, be items connected with it. It was simply a sum of money that was improperly, erroneously, and illegally obtained under the guise of the process of execution, and with regard to which no order could be made in the execution department. The present suit was, therefore, the necessary remedy. These views I find are supported by two Calcutta rulings, in which it is laid down that s. 11 of Act XXIII of 1861, does not enable any party to recover in execution anything, except that which has been given by the decree, and that the "question" as used in s. 11 must relate to something comprised in the decree, and that any other cannot be a question relating to its execution, *Elkonri Sing and others v. Bijay Nath Chattapadhyay* (4 B. L. R., Ap. C., 111), following *Haromohan Chaudhrani v. Dhumari Chaudhrani* (1 B. L. R., Ap. C., 135). It is true that the ruling appears to be opposed to a full bench decision of the Madras High Court, *Arunchilla Pillai v. Apava Pillai* (3 Mad., H. C. R., 188), by a majority of three Judges to two, but, for myself, I prefer the reasoning of the Chief Justice (Sir C. SCOTLAND, C.J.) and Mr. Justice INNES, which, so far as it goes, is in accordance with the principle of construction recognized by the Calcutta ruling to which I referred.

Respecting, therefore, the competency of this suit, I agree with the Zilla Judge. But I differ from him when he says that the suit is cognizable by the Civil and not by the Small Cause Court, for in my judgment, the claim is in the nature of damages within the meaning of s. 6 of Act XI of 1865, and this conclusion seems to be in conformity with several Calcutta rulings (2 B. L. R., Ap. C., 172; 2 B. S. N., 13 and 10, W. R. 75; and 9 W. R. 336).

I would, therefore, annul the Judgment of the Lower Appellate Court, and dismiss the suit on the ground of want of jurisdiction, but without prejudice to the plaintiff suing in the Small Cause Court, and for that purpose direct the plaint to be returned to him. It is unnecessary to say anything as to the plea of limitation.

Decree reversed.

NOTES.

[This case was dissented from in (1878) 2 All. 61 F. B., see also (1882) 5 All. 94.]

[392] APPELLATE CIVIL.

The 2nd May, 1877.

PRESENT:

SIR ROBERT STUART, KT., CHIEF JUSTICE AND MR. JUSTICE OLDFIELD.

Basant Ram.....Plaintiff

*versus*Kolahal and others.....Defendants.^{*}

*Act XXIII of 1861, s. 4—Defendants not all within jurisdiction—
Bankruptcy of acceptor of hundi—Holders' option.*

In a suit on a hundi payable at Calcutta, the acceptor there having become bankrupt before the hundi reached maturity, brought by the holder in the place where the hundi was drawn against the two partners of the firm that drew the hundi, and also the acceptor, who resided at the time of suit, beyond the local jurisdiction of the Court passing the decree, the lower Appellate Court having dismissed the suit on the ground that the Court of the First Instance could not without the sanction provided by s. 4† of Act XXIII of 1861 pass a decree against the defendant who resided beyond its jurisdiction. *Held*, following the English law, that it was not necessary to sue the bankrupt defendant, and that the holder of a hundi is not bound, in the event of its dishonour, to sue all the parties liable under it, but may select any one or more of them.

THE plaintiff in this case was the payee of a hundi drawn by two of the defendants who resided at Basti, on the third defendant, Ram Kishen, who managed a branch of the firm at Calcutta. After due presentation and acceptance of the hundi by the third defendant at Calcutta, the latter became insolvent before the hundi matured. The payee of the hundi, accordingly, sued all three defendants for the recovery of the amount which he had paid to the first and second defendants on obtaining the said hundi.

All three defendants pleaded that, plaintiff having sold the hundi could no longer sue on it, that the suit was barred by limitation, and that the suit as brought, was not cognizable by the Munsif's Court. The Munsif, finding that the hundi had not been paid, and that the three defendants carried on the same business together within his jurisdiction, decreed the suit against them. The Subordinate Judge of Gorakhpur, on appeal by the defendants, held, that inasmuch as the third defendant did not reside within the local jurisdiction of the Munsif's Court, the Munsif was not competent to pass a decree against

* Special Appeal, No. 1854 of 1876, from a decree of Maulvi Sultan Hasan, Subordinate Judge of Gorakhpur, dated the 24th August 1876, reversing a decree of Maulvi Muhammad Kamil, Munsif of Basti, dated the 25th March 1876.

†[Sec. 4:—If in any suit there are more defendants than one, and at the date of the institution of the suit all the defendants shall not reside within the jurisdiction of the Court in which the suit is brought, but one or more of the defendants shall reside within such jurisdiction the suit shall not be rejected by reason of all the defendants not residing within the jurisdiction of the Court in which the suit is brought

In what Court a suit against several defendants may be brought. but the District Court, if the suit is pending in any Court subordinate to such Court, or the Sudder Court, may order that the suit be heard in any Court subordinate to such Sudder or District Court, and competent in respect of the value of the suit to try the same.]

all three defendants, without obtaining the [398] permission of the District Court, within the limits of which the third defendant resided. The Subordinate Judge, accordingly, dismissed the suit as brought. The plaintiff preferred a special appeal to the High Court, on the ground that all the three defendants being engaged in a joint business within the jurisdiction of the Court of First Instance, the suit was properly brought in the Court of the Munsif, and that even if, by reason of the third defendant's residing beyond the jurisdiction of that Court, the Munsif had no power to pass a decree against all three defendants, yet that this defect did not warrant the Subordinate Judge in dismissing the suit altogether.

The Senior Government Pleader (*Lala Juala Prasad*), Munshi *Hanuman Prasad* and Mir *Zahur Husain* for Appellant.

The Junior Government Pleader (*Babu Dwarka Nath Banarji*) for Respondent.

Judgment:—If it had been necessary to make Ram Kishen a defendant in this case, the procedure should have been as provided by s. 4 of Act XXIII of 1861, and the sanction of the proper Court in Calcutta obtained, but we do not consider that it was necessary to implead him at all even if he had not declared his bankruptcy, which it appears he did, when the hundi was presented to him for payment. The holder of a hundi, or, in other words, of a bill or note, is not bound, in the event of its dishonour, to sue all the parties liable to him under it, but he may, at his option, select his defendant or defendants, as he may judge best for recovery of the money. This is the law of England, where, although the holder of a bill may have issued the writs, or a writ, against all or any of his debtors, he is not bound to sign judgment against them all, but may select any one or more of them, and I am not aware that the law is different here. Besides, in the present case, the two defendants, Kolahal Ram and Gobind Ram, were those who got the whole Rs. 600 from the plaintiff, and it would have been sufficient to have proceeded against them, and to have left their bankrupt representatives in Calcutta alone, especially as his declared bankruptcy, which was tantamount of itself to a refusal to pay, gave the plaintiff a cause of action against the other two. This view of the law also avoids objection on the ground of misjoinder.

[394] We set aside the decrees of both the lower Courts, and remand the cause under s. 351 of Act VIII of 1859, for trial of the suit on its merits against the two defendants, Kolahal Ram and Gobind Ram, for the whole amount claimed under the hundi. The costs of this appeal to abide the result.

Decree reversed and case remanded.

[1 All. 394]

APPELLATE CIVIL.

The 9th May, 1877.

PRESENT:

MR. JUSTICE SPANKIE AND MR. JUSTICE OLDFIELD.

Sital and another.....Defendants

versus

Madho.....Plaintiff.*

Act not done void—Exclusive gift—Father's powers—Hindu law—Mitakshara—Implied prohibition—Self-acquired immoveable property—Son's rights—Smriti Chandrika—Spiritual responsibility.

A Hindu son, subject to the Mitakshara law of inheritance, sued to obtain a declaratory decree for a moiety of a house which the father had conveyed by deed of gift to plaintiff's brother, being the self-acquired immoveable property of his father, on the ground that, under the Hindu law, a father is not permitted to make a gift of immoveable property to one son to the injury of the other.—*Held* (reviewing all the authorities and precedents on the subject) that although prohibition of such a gift, on moral or spiritual grounds, may be implied by the texts of Hindu law, yet, where it is not declared that there is absolutely no power to do such acts, those acts, if done are not necessarily void, and that, therefore, an exclusive gift to one son by the father of self-acquired immoveable property is not illegal.

Pandit Ajudhia Nath and Babu Baroda Prasad for Appellants.

The Senior Government Pleader (Lala Juala Prasad) and Munshi Hanuman Prasad for Respondent.

THE facts of the case out of which the present appeal arose, and was decreed by the High Court, will be found fully set forth in the Court's Judgment which was delivered by

Spankie, J.—The plaintiff and defendant, Sadho, in this suit are the sons of one Sital, also a defendant.

The property in dispute is a dwelling-house purchased by Sital in 1861, and transferred by gift on the 13th September 1875, by him to Sadho.

[395] The plaintiff sues to avoid the deed of gift in favour of Sadho, and claims a declaratory decree for a moiety of the house, on the ground that his father was not permitted by the Hindu law to make a gift of immoveable property to one son to the injury of the other.

* Special Appeal, No. 308 of 1877, from a decree of H. Lushington, Esq., Judge of Allahabad, dated the 10th December 1876, affirming a decree of Babu Mritonjoy Mukerji, Munsif of Allahabad, dated the 4th July 1876.

The defendant Sadho contends that the plaintiff discloses no ground of action, and the property in suit having been acquired by Sital, he was at liberty to dispose of it as he pleased.

The Munsif held that, if the Hindu law did not allow the gift, the plaintiff had good cause of action. On the point of law it was not necessary to express an opinion, as the High Court determined it, laying down that the exclusive gift of self-acquired property to one son, when there were other sons, is illegal, *Mahasukh v. Budri* (H. C. R., N.-W. P., 1869, 57).

In appeal the Judge affirmed the decree, holding himself bound by the precedent cited by the Munsif (H. C. R., N.-W. P., 1869, 57), and believing that it represented the commonly received doctrine in these provinces, though the Calcutta Court had taken a diametrically opposite view of the law (10 W. R., 247, *Bawa Misr v. Raja Bishen Prokash Narain Singh*).

The defendant in special appeal urges, as in the first Court, that the property having been self-acquired by Sital, he was quite competent to make a gift of it in favour of one son, to the exclusion of the other.

The case cited as having been determined by this Court refers to no authority expressly. The learned Judges observe that the texts of the law support the doctrine that a man's immoveable property, although self-acquired, is not within his power of disposal so absolutely, by gift in his lifetime, as to enable him to give it all to one son, or grandson, in exclusion of the rest. The Court also remarked that they had not to deal with the case of an unequal division of immoveable property, for the gift was an exclusive gift; as the learned Judges do not cite their authorities, we do not consider ourselves bound by the decision.

[396] The learned pleader for the appellant, Pandit Ajudhia Nath, referred to various authorities and precedents of this, and the Presidency Court. Some of the cases cited* are not absolutely conclusive on the point before us. The judgment of the judicial committee of the Privy Council in *Rungama*, appellant, v. *Atchama* respondent (4, Moo. I. A., p. 1), determined a question relative to a second adoption of a son, the first adopted son being still alive. It appears, however, to recognise the competency of a father to dispose of property that was not ancestral, by an act "inter vivos" without the consent of all his sons, and so far the principle would extend to the case before us, the other case cited *Nana Narain Rao*, appellant v. *Huree Punth Bhaos, Sree Newas Rao*, and *Balwant Rao*, respondents (9, Moo. I. A. 96), does not touch the matter now in dispute. It establishes a will which disposed of the testator's self-acquired property unequally amongst his sons, but it does not go beyond this. The case decided by the Agra Sudder Dewany Adawlat in 1861, is of no authority (S. D. A. Agra, 1861, 228). It refers to no texts, and does not enter into the point, or any argument.

The precedent of the Calcutta Court, "Muddun Gopal Thakur and others" (6, W. R., 71), refers to a case in which the plaintiff's grandfather originally acquired the lands in dispute. He had several wives and several sons. By deed of gift he gave the property in dispute to the plaintiff's father, and provided

* Mitakshara, Chap. I, p. 27, sec. 1, Chap. I, secs. 5, 10, 11. Moore's Indian Appeals. Vol. IV., p. 103; Vol. IX., p. 96. 6 W. R., p. 71. 10, W. R. p. 287. Agra S. D. A., 1861, 228, H. C., N.-W. P. R. A., No. 150 of 1874, dated 11th May 1876.

for all his sons by other deeds of gift. The plaintiff's father made a deed of sale of the property in favour of the defendant. It was held that, according to the Mitakshara, a father is not incompetent to sell immoveable property acquired by himself; also that landed property acquired by a grandfather, and distributed by him amongst his sons, does not by such gift become the self-acquired property of the sons so as to enable them to dispose of it by gift or sale, without the consent and to the prejudice of the grandsons. In this decision the texts and authorities are directly referred to, and the question is exhaustively treated. The other case cited from the Weekly Reporter, [397] (10 W. R., 287), "Bawa Misr," follows this judgment:—The question, however, was, whether the father could, by will, make an unequal distribution of his self-acquired estate amongst his heirs. But the principle of the Court's ruling would apply to the suit before us, and both the decisions put the same interpretation on the texts in the Mitakshara, that we are disposed to do. Para. 27, chapter I, s. 1, declares that it is a settled point, that property in the paternal or ancestral estate is by birth. The father is declared to be subject to the control of his sons in regard to the immoveable estate, whether acquired by himself, or inherited from his father or other predecessor, since it is ordained that though immoveables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons, they who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support, and no gift or sale should therefore be made. The respondent's pleader relies on this passage, as being an absolute declaration that any such gifts, or sale of self-acquired property is illegal. But the words do not go quite so far as this. Such a sale or gift *should* not be made without convening all the sons. It would be wrong, and contrary perhaps, to the spirit of the Hindu law, to make such a sale, or gift, that might prejudice the rights of the sons, or tend to limit their means of support, but there is no declaration that the transaction would be absolutely void. The father, it is true, is to be subject to the control of his sons in regard to the immoveable estate, whether acquired by himself, or inherited from his father or other predecessor. But even this control appears to be limited. In s. 5 of the Mitakshara, in which the equal rights of father and son in ancestral property are discussed, para. 9 declares the grandson's right of prohibition, if his unseparated father is making a donation, or a sale of effects inherited from his grandfather. But he has no right of interference if the effects were acquired by the father; on the contrary, he must acquiesce because he was dependent. Para. 10 goes on to explain the difference. Although the son has a right of birth in his father's, and his grandfather's property, still, as he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest, as it was acquired by himself, the son must [398] acquiesce in the father's disposal of his own acquired property, but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction, but then only if the father be dissipating the estate.

In noticing the apparent contradiction between para. 27, s. 1, chap. I, and paras. 9 and 10, s. 5, chap. I, the learned Judges who decided the case of Muden Gopal (6 W. R., 71), remark that the apparent conflict is reconciled if the right of the sons in the self-acquired property of the father is treated as an imperfect right, incapable of being enforced at law. The words "should not" and "shall not" imply a prohibition, but not an absence of power to do the prohibited act. The learned Judges add that a colour is further given to this construction, by a passage in the Mitakshara on the administration of justice, chap. IV, s. 1 para. 10. Macnaghten's Hindu Law, vol. 1. p. 227, where the author, in stating

who are capable of maintaining actions, says: "In case of land acquired by the grandfather, the ownership of father and son is equal, and therefore if the father make away with the immoveable property so acquired by the grandfather, and if the son have recourse to a Court of Justice, a judicial proceeding will be entertained between the father and the son." But the right of suit is not mentioned as extending to the case where a father alienates his own self-acquired immoveable property.

In the regular appeal (unreported Regular Appeal, No. 150 of 1874, decided on 11th May 1875), cited by the appellant's pleader as having been determined in 1875 by this Court, the learned Judges have also remarked on these apparent contradictions, and they observed that the only rational mode which has been suggested of reconciling the apparently contradictory doctrine is to suppose that para. 27, s. 1, refers to acquisitions of immoveable property made by the father with the use and by the aid of ancestral funds. The community of interest which the son has with the father in the grandfather's property, is the foundation of the restriction of the father's power in respect thereof. But the son has no community of interest with the father in property acquired by him independently of ancestral funds, and consequently there can be no restriction [399] on the latter's freedom in dealing with it. But with due respect to the learned Judges who made these remarks, the true reason appears to be this, that as long as the father lives, the control remains with him. The sons, as we have seen, are dependent on the father. In chapter I, s. 5, para. 7, which declares "the dependence of sons," is affirmed in the following passage, "while both parents live, the control remains, even though they have arrived at old age," must relate to the effects acquired by the father or mother. This other passage "they have not power over it" (the paternal estate), "while their parents live," must be referred to the same subject (self-acquired property). In ss. 9 and 10, which we have already quoted above, the dependency on the father, and the predominant interest of the father in self-acquired property, is what restricts the son from exercising any interference with its disposal. This view of the question is borne out by a passage in chap. VIII of the Smriti Chandrika, a work of special authority of the Madras school, where the interest of the son in the father and grandfather's property is treated of. In para. 21 it is asked how could there exist such inequality while the son possesses a right, by birth, in both his grandfather's and father's property. The reply is, that in the case of the grandfather's property, the ownership, and also the independent power, are both equal in the father and son, whereas in the case of the father's property, while he is alive and free from defect, he alone possesses independent power, and not the son.

We, however, are prepared to rest the reconciliation of the apparent contradiction, on the ground that there is nothing more than a prohibition implied in para. 27, s. 1, chap. I. There is no express declaration that a gift or sale so made is *ipso facto* void, because the donor or vendor has no power to make it, and we also consider that the rulings of this Court on other points of Hindu law, have recognised the principle that, though prohibition of certain acts may be implied, yet, where it is not declared that there is absolutely no power to do them, those acts, if done, are not necessarily void. This recognition is partially supported by Sir Thomas Strange, who admits a certain discretion on the part of the father, to deal with self-acquired property, and also by a passage

Vide chap. IX on Partition. in Macnaghten's Principles of Hindu Law, chap. I, where he lays down, as the result of [400] all authorities, "that with respect to personal property of every

description, whether ancestral or acquired, and with respect to real property acquired or recovered by the occupant, he (the father) is at liberty to make any alienation which he may think fit, subject only to spiritual responsibility."

Entertaining this view of the point in dispute, and finding, as we believe, that authority and precedent are with us, we have no hesitation in holding that the decision of the Judge is wrong, and that this exclusive gift by Sital the father, to his son Sadho, of the house in dispute, was not illegal under the Hindu law, and the facts not being disputed, the claim should have been dismissed. We accordingly decree this appeal and dismiss the claim, by reversing the judgments of the Courts below, with costs.

Decree reversed.

NOTES.

[The Hindu father's right of disposition over his self-acquired immoveables is recognised in all the schools :—(1886) 10 Bom. 528 ; 10 Mad. 251 ; 20 All. 267 P. C.]

[1 All. 400]

APPELLATE CIVIL.

The 28th May, 1877.

PRESENT:

SIR ROBERT STUART, Kt., CHIEF JUSTICE AND MR. JUSTICE PEARSON.

Major-General Showers.....Defendant

versus

Seth Gobind Dass.....Plaintiff.*

*Act VIII of 1859, ss. 240, 248—Act XIX of 1873, s. 3, cl. 1—Irregularity
in publication of Court sale of Khalisa Mahal.*

In the case of a sale by the Civil Court of forest land, which formed a grant from Government under a deed describing the property as a " Khalisa Mahal," subject to the payment of revenue after a term of years, the sale not having been proclaimed at the site of the grant. Held, that the sale was invalid by reason of irregularity in the publication, and because it was not competent to the civil court to sell land chargeable with, although not actually paying revenue at the time of sale, such Khalisa Mahals being revenue-paying lands within the meaning of s. 248 of Act VIII of 1859, and s. 3, cl. 1, Act XIX of 1873, and that therefore the sale should have been held by the Collector.

THE decree holder, respondent in this case, attached through the Court of the Judge of Small Causes exercising the powers of a Subordinate Judge in Dehra Dun, a grant of forest-land comprising 2,080 acres conferred by Government upon the judgment-debtor, General Showers, on terms embodied in a deed. By the said deed [401] it was stipulated that revenue on the land conveyed by the grant would become payable after the expiration of three years, during which term the land should be held free of revenue. Upon attachment of the land during the said term, and after the order for its sale by the Court Amin, had been passed by the Dehra Dun Court, the judgment-debtor, by petition, objected that the land attached and advertised for sale was in fact a Khalisa Mahal (and so described in the deed of grant), paying revenue to Government, and that under the provisions of s. 248 of Act VIII of 1859 the sale should be effected through the Collector. The Subordinate Judge overruled the objection on the ground that s. 248 of Act VIII of 1859 applied to land actually paying revenue to Government, and not to land which would be subject to revenue at some future time.

* Miscellaneous Regular Appeal, No. 5 of 1877, from an order of R. Alexander, Esq., Judge, Small Cause Court, Dehra Dun, with special jurisdiction, dated the 11th December 1876.

The sale having been effected by the Court, the judgment-debtor petitioned the Court again, praying that the sale might not be confirmed, as publication of the sale was irregular in that it was not duly proclaimed at or near the land; further, that the sale notification neither described the property to be sold with the requisite distinctness, nor contained any mention of where the sale would be held; in consequence of which material irregularities the judgment-debtor had been greatly prejudiced. The Court found against the petitioner on all the irregularities alleged, except as to the sale not having been proclaimed on the land, which omission the Court, however, held not to be a material irregularity, and accordingly disallowed the petition.

From these orders of the Subordinate Judge, the judgment-debtor appealed to the High Court, on the ground that the sale proceedings were in contravention of the provisions of s. 248 of Act VIII of 1869, whereby the appellant sustained substantial injury, and that the said Court was not competent to conduct the sale of property paying revenue to Government.

The High Court in the following judgment decreed the appeal with costs, holding that the sale was invalid, both by reason of the irregularities alleged in conducting the sale, and because the property sold, though not paying revenue at the time of sale, was a [402] Khalisa Mahal paying revenue to Government, and that the sale should, therefore, have been held by the Collector.

Messrs. Ross and Hill for Appellant.

The Junior Government Pleader (Babu Dwarka Nath Banerji) and Munshi Hanuman Prasad for Respondent.

Judgment.—We are disposed to hold that the irregularities in publishing and conducting the sale are such as to render it invalid.

The place where the sale was to take place was not described with sufficient distinctness, nor was proclamation made on the spot as required, and there is no reason why the requirements of the law in this respect should have been omitted. But we further hold that the sale should not have been conducted by the officer of the Civil Court, but should have been held by the Collector, the estate being land paying revenue to Government within the meaning of s. 248 of Act VIII of 1859.

The property is a jungle grant situated in the eastern Dun, which at the time of the sale, had been granted to, and was in possession of General Showers. It was granted under the rules for such grants, which were subsequently formally embodied in the deed of 21st February 1877. Under the terms of the grant, no revenue was payable by the grantee for the first three years, but became payable for the fourth or following years. But because no revenue was payable at the time of actual sale, we cannot hold, with the Judge, that the estate was not a revenue paying estate within the meaning of the section.

The term "paying revenue" in s. 248 is used in contradistinction to "revenue-free" and will apply to all lands known as "Khalisa." The Government treated this estate as such, for it is so described in para. XI of the deed of grant, and such lands have always been so regarded, as may be implied from para. 20 of the present rules dated the 7th October 1876, for grant of waste lands. When

the land granted on such terms as these is considered to be a mahal, as defined in s. 3, cl. I of Act XIX of 1873, and subject to all conditions attaching by law to such terms, the remission of revenue for a few years on the land will not alter its general character as [403] Khalisa, or revenue paying, the revenue still remains assessed. It often happens that Government remits the revenue of revenue paying estates for several years, on various grounds, but the estates do not cease to be considered revenue paying, so far as to be subject to the conditions attaching by law to such estates.

We decree the appeal with costs, and set aside the order of the Judge, and set aside the sale.

Decree reversed.

[1 ALL. 403]

APPELLATE CIVIL.

The 28th May, 1877.

PRESENT :

MR. JUSTICE TURNER AND MR. JUSTICE OLDFIELD.

Param Singh.....Defendant

versus

Lalji Mal.....Plaintiff.*

Agreement not to execute decree—Breach of faith—Deed of conditional sale—Defeating claims of third persons—Disavowal of trust—Estoppel—Execution—Ex parte decree—Fictitious transaction—Foreclosure proceedings—Justice, equity, and good conscience—Limitation—Position under deed—Prejudice—real nature of transaction—Relief—Suit to enforce agreement—Wrongful execution.

The plaintiff sued in 1875 to recover possession of immoveable property which the defendant had obtained in 1878, in execution of an *ex parte* decree dated the 8th June 1861. That decree was founded on a deed purporting to be a deed of conditional sale dated the 24th December 1853, executed by the plaintiff in favour of the defendant. The plaintiff alleged that the deed was executed in order to protect the property against the claims of plaintiff's son, and the plaintiff sought to set it aside on account of defendant's breach of an agreement dated the 16th January 1856, whereby the defendant stipulated that plaintiff's possession should not be disturbed. The defendant *inter alia* pleaded estoppel, and the bar of limitation, against plaintiff's suit. Held, that the suit was not barred by limitation, as plaintiff's cause of action only arose when defendant first practically disavowed the trust by seeking more than nominal execution of decree, and [following (18 Moo. I. A., 551. *Ram Saran Singh v. Musammat Ram Peary*) and (27 L. J., N. S., 262. *Bowes v. Foster*)] that plaintiff is not estopped from showing the real truth of the transaction between plaintiff and defendant, and from obtaining relief through the Court against defendant's breach of good faith, because of

* Regular Appeal, No. 7 of 1876, from a decree of Maulvi Muhammad Wajah-ul-lah Khan, Subordinate Judge of Moradabad, dated the 30th November 1875.

plaintiff's attempt to hinder or defeat the possible claim of a third party, the maxim "*in pari delicto potior est conditio possidentis*," not being applicable without qualification to India, where justice, equity and good conscience require no more than that a party should be precluded from contradicting, to the prejudice of another, an instrument pretending to the solemnity of a deed when the parties claiming under it, or their representatives, have been induced to alter their position on the faith of such instrument.

[404] THE plaintiff in this suit, filed on the 27th July 1875, claimed to "recover possession of a ten biswa share in each of the mauzas Mayola and Dudhrajpur, pargana Thakurdwara, valued at Rs. 8,000 by cancellation and invalidation of a deed of conditional sale dated the 24th December 1853," in favour of defendant. The plaintiff set out that the deed of conditional sale was a fictitious transaction entered into with the defendant, an intimate friend, to protect the property in consequence of disagreements between plaintiff and his son that the defendant had executed an agreement on the 16th January 1856, stipulating that should the deed of conditional sale be followed by foreclosure proceedings and a decree of Court, nevertheless that the defendant would not attempt to disturb plaintiff's possession over the property,—that in breach of this agreement defendant attempted in 1877 to execute decree for possession obtained on the 8th June 1861, when plaintiff's claim to the property was allowed by the Munsif. The Munsif's order was dated 19th April 1873, and was reversed by the Principal Sadr Amin on the 27th July 1874, on appeal by the defendant, on the ground that it was not competent to the Munsif to set aside a decree on the miscellaneous side, the questions of collusion and fraud involved in the Munsif's order being properly the subject-matter of a regular suit. The cause of action alleged in the plaint was the High Court Judgment dated the 11th December 1874 affirming the Principal Sadr Amin's decision of the 27th July 1874, in the miscellaneous proceedings in execution of decree above referred to, which awarded possession of the property in dispute to the defendant.

The defendant's written statement, filed on the 31st August 1875, put forward the following pleas in defence, that the decree dated the 8th June 1861, having been passed *ex parte*, and plaintiff not having applied to set it aside under s. 119 of Act VIII of 1859, the decision became final, and the suit was barred under s. 2nd of Act VIII of 1859; that the claim to set aside the deed of conditional sale was barred by cl. 92[†] of sch. II of Act IX of 1871, which provides

Unless suits previously heard and determined. * [Sec. 2 :—The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim.]

† [Art. 92 :—

Description of Suit.	Period of Limitation.	Time when period begins to run.
To cancel or set aside an instrument not otherwise provided for.	Three years ...	When the instrument is executed.]

that a claim to cancel and set aside an instrument must be brought within three years from the date of execution of the instrument; that the claim to set aside the decree of the 8th June 1861 was barred by cl. 96*, sch. II of Act IX of 1871 [408] which provides a period of three years' limitation from the time when the fraud became known to the party wronged, and that the claim for specific performance of the contract, as based on defendant's alleged agreement dated 16th January 1856, was barred by cl. 113† of Act IX of 1871, which provides that specific performance of a contract must be sought within three years from the time when plaintiff has notice that his right is denied. On the merits, various defences were set up which are stated in the judgment.

The Subordinate Judge decreed the suit, and the defendant appealed to the High Court on grounds which, in effect, recapitulated the pleadings contained in defendant's written statement given above.

Pandits Bishambar Nath and Nand Lal for Appellant.

Munshis Hanuman Prasad, Sukh Ram, and Babu Barodha Prasad for Respondent.

The Judgment of the Court was delivered by

Turner, J. "The respondent was the owner of a ten biswas share in each of the mauzas Mayola, Dudhrajpur, and on the 24th December 1853 he executed a deed of conditional sale transferring these properties to the appellant for an alleged consideration of Rs. 1,000, repayable with interest at twelve per cent. in four years. The deed declared that possession had been given to the conditional vendee. In 1860 the appellant caused a notice of foreclosure to be issued, and on the 28th June 1861, he obtained an *ex parte* decree for possession.

On the 18th July 1861, Nathmal Das obtained a decree for money against the respondent, and in execution of that decree he attached the rights and interests of the respondent in the property above mentioned. The appellant intervened, and on his objection the property was released on the 26th January 1865. Nathmal Das then instituted a suit to contest the order. He alleged that the conditional sale-deed of December 1853 was fraudulent and collusive.

*[Art. 96 :—

Description of Suit.	Period of Limitation.	Time when period begins to run.
To set aside a decree obtained by fraud	... Three years	... When the fraud becomes known to the party wronged.]

†[Art. 113 :—

For specific performance of a contract	... Three years	... When the plaintiff has notice that his right is denied.]
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The appellant and respondent were both made parties to this suit. The appellant appeared and contended that the mortgage was valid, and he also pleaded the foreclosure and decree obtained in 1861. The respondent did not appear. The Principal [406] Sadr Amin held that Nathmal Das had failed to establish his case, and dismissed the suit, and on appeal his decree was affirmed.

The first occasion on which the appellant applied for execution of his decree of the 8th June 1861, was on 25th April 1864. On the 28th June 1864, it was ordered that notice should issue, and the amin's fee be deposited. It does not appear whether notice was served: the proceedings were struck off the file on the 11th July 1864, because the amin's fee had not been deposited.

The next applications were made on the 19th June 1865, and on the 10th August 1866, but the decree-holder did not proceed with them. On the 24th June 1869, another application for execution was put in, and notice issued. On the 10th July the decree-holder informed the Court that, inasmuch as arrears of revenue were still due, he did not desire to obtain possession, and prayed that the proceedings might be struck off the file. On the 13th July 1869, the respondent put in a petition in which he alleged the decree was collusive, and that the applicant was, in fact, a trustee for him.

On the 2nd March 1870, the appellant presented another application for execution, but immediately afterwards, he informed the Court he did not desire to proceed with it, and that, if any settlement took place, a sulehnamat would be filed.

At last, in 1872, the appellant seriously took proceedings to execute his decree and obtained possession. The respondent resisted the application. He alleged, as he alleges in this suit, that in order to prevent his eldest son, by his first marriage, from obtaining the property, he had arranged with the appellant, his intimate friend, to make a pretended transfer of the property to him, and that in pursuance of this arrangement he executed the deed of conditional sale of December 1853, that in fact no money passed as consideration for the deed, that in 1856 the appellant, at his instance, executed a deed acknowledging the respondent's title to the property, that the decree of 1861 was also obtained to conceal the true ownership of the property, and that he had all along remained in possession, and dealt with the property as his own, to the knowledge of the appellant. The Munsif allowed the objection, and dismissed the application for execution. The Principal Sadr Amin reversed [407] the Munsif's order, and the High Court affirmed the Principal Sadr Amin's order, on the ground that it was not competent to a Court executing a decree to annul the decree. The appellant consequently obtained possession.

The respondent then instituted the suit which is now before this Court in appeal. He averred that the deed of conditional sale had been executed without consideration, and with a view to defeat a claim which he thought might be made by his son by his first wife, that in prosecution of the design to conceal the ownership of the property he contrived the foreclosure proceedings, and the suit which customarily follows such proceedings, that in fact it was not intended the property should pass to the appellant, that he was a mere trustee, *ismfarsi*, for the respondent, that the respondent had, notwithstanding the proceeding above referred to, remained in possession of the property, and exercised acts of ownership until by the execution of the decree, in fraud of the respondent, the

appellant obtained possession. The respondent also relied on the terms of an agreement, which he asserted had been executed by the appellant on the 16th January 1856, and which is in the following terms :—

" I, Param Singh, son of Bhup Singh, by caste Jat, and resident of mauza Jahangirpur, pargana Thakurdwara, do hereby declare that whereas Lalji Mal, a resident of mauza Myola, has executed in my favour an *ismfarzi* deed of conditional sale, dated the 24th December 1853, in respect of a ten biswa share in each of the mauzas Mayola aforesaid and Dudhrajpur in pargana Thakurdwara, because Ganga Ram, the son of the said Lalji Mal, by his first wife, deceased, quarrels with him, and is trying to get the said share from him. I record and agree that even if I, as a matter of expediency, obtain a decree by suing on the said deed of conditional sale, or if I should try directly or indirectly, privately or through the Court, to take or obtain possession of the property entered in the said deed of conditional sale, or if any of my heirs should wish to take or obtain possession, I, or my heir, or successor, shall not, according to the agreement, be competent to be the owner of the said property, and that should I in contravention of the terms of this agreement obtain possession, or endeavour to obtain possession, all the proceedings connected [408] with the sale and the foreclosure shall be deemed invalid according to this instrument. I have, therefore, executed this agreement that it may serve as evidence. "

(Sd.) PARAM SINGH, with his own pen.

The stamp paper on which this agreement is written bears, an endorsement to the effect that it was purchased by the appellant, a few days before the date of agreement.

The appellant replied that the *ex parte* decree obtained on the 8th June 1861, the order obtained by him when objecting to the execution of Nathmal's decree, the dismissal of the suit brought against him by Nathmal, and the rejection of the respondent's objection when he took out execution of the decree of 1861, estopped the respondent from maintaining the suit, and that the claim, involving the supersession of the conditional sale deed executed in 1856, and the decree of 1861, was barred by limitation. On the merits, the appellant pleaded that the deed of conditional sale had been executed for the consideration therein expressed, and he denied the execution of the agreement of 1856, and accounted for the stamp endorsement by asserting that in 1869, he had been attacked by Kesri, the brother-in-law of the respondent, and had been robbed of a bundle of papers from which a blank paper, bearing a stamp, might have been extracted and the agreement fabricated. The Subordinate Judge overruled the defences set up on points of law, and on the issues of fact, while he considered the appearance of the agreement suspicious, he considered the proof of its execution, on the whole, trustworthy, and apart from the agreement, adopting the reasons given by the Munsif in support of his order in April 1873, the Subordinate Judge declared he entertained no doubt that the deed of conditional sale, the foreclosure, and decree for possession, were obtained by collusion, and he pointed out that this was admitted by Azmat Ali, a witness, who had been summoned by the appellant. The Subordinate Judge, considering that both parties had been parties to a fraud, nevertheless held that the appellant ought not to obtain the benefit of the further fraud he had practised on the respondent, and, therefore, he passed a decree in favour of the respondent. In appeal, it is contended on the part of the appellant that the suit is not maintainable in that the respondent cannot be allowed to set up his own fraud, but is bound [409]

thereby ; that the decree of June 1861, having become final, the suit is barred ; that inasmuch as the claim involves the setting aside of the decree of 1861, it is barred by limitation ; that the execution of the deed of conditional sale for consideration is proved ; that the alleged agreement of 1856 is false and fabricated, and that the decree of 1861 was not obtained in collusion with the respondent.

Before entering on the question of law, it will be more convenient to determine the question of fact raised in the appeal. We see no reason to dissent from the conclusion at which the Subordinate Judge has arrived as to the facts of the case. (The learned Judge after discussing the evidence relating to consideration proceeded as follows :)

On the facts, then, found by the Court below and by this Court, is the respondent entitled to relief ? That the suit is not barred by limitation is clear. The cause of action alleged by the respondent is the possession obtained by the appellant in 1875. According to the averments of the respondent, no cause of action accrued to him until the appellant disavowed the trust, and proceeded to obtain possession of the property, against the will of the respondent. The mere proceeding to keep alive the decree, would not be a disavowal of the trust. The appellant seriously sought to execute his decree in 1872, and limitation ought not to be computed from an earlier date than that application ; if the suit is to be regarded as a suit not merely for possession, but for a declaration that the conditional sale deed was not intended to pass the property, and that the decree should not operate to injure the right of the respondent, in which view of the suit, six years is the period prescribed ; or if, by rejecting as surplusage the claim for the invalidation of the conditional sale deed, the suit be, as we think it should, a claim for possession, the period of limitation is 12 years, to be computed from the date on which possession was obtained in execution of the decree of 1861, which could not have happened till the Munsif's order was reversed by the Judge in 1873 ; consequently, in either view, the suit instituted in July 1875 was not barred by limitation.

We have next to determine whether, on the facts found, the respondent was entitled to maintain the suit. Four several issues [410] arise on this point. Is he estopped by the execution of the deed of conditional sale from asserting that it was executed, not to secure the repayment of a loan, but for the purpose of creating an apparent title in the appellant ? Is he estopped by the decree obtained after foreclosure in 1861 ? Is he estopped by the judgment in the suit brought by his creditor against the respondent and the appellant ? and, lastly : Is he estopped by the circumstance that he is obliged to have recourse to the Court for relief, by reason of his attempt to hinder, or defeat, the possible claim of a third party ?

In this country where *ismfarzi* transactions are so common, and when they have been so commonly recognized by the Courts, we should establish a dangerous precedent were we to rule that, under all circumstances, a party is bound by his deed, and concluded from showing the truth. That the respondent may show that nothing was due on the deed, that, certainly, if he were defendant, he would not be estopped from showing the real truth of the transaction, we have authority in *Ram Saran Singh v. Musammat Ram Peary* (13 Moo. I. A., 551), where the defendant, a widow was allowed to prove, in answer to a claim brought by her brother on a deed of conditional sale, that the deed was concocted by her and her brother to defeat the claim of her

husband's heirs. If the party to a deed is to be precluded from questioning his solemn act, much injustice would be wrought in this country. The strictness of the rule of estoppel has been in England relaxed. If it is to be used to promote justice, the degree of strictness with which it is to be enforced must be proportioned to the degree of care and intelligence which the natives of the country in practice bring to bear upon their transactions. What is ordinarily known in these provinces as a deed is an attested agreement prepared without any competent legal advice, and executed and delivered by parties who are unaware of any distinction between deeds and agreements. Under these circumstances, it appears to us that justice, equity, and good conscience required no more than that a party to such an instrument should be precluded from contradicting it to the prejudice of another person, when that other, or the person through whom the other person claims, has been induced to alter his position on the faith of the instrument; [411] but where the question arises between parties, or the representatives in interest of parties, who, at time of the execution of the instrument, were aware of its intention and object, and who have not been induced to alter their position by its execution, we consider that justice, in this country, will be more surely obtained by allowing any party, whether he be plaintiff or defendant, to show the truth. We hold that the respondent is not estopped by the deed from showing the nature of the transaction.

In the precedent already cited, it was also ruled that a pleading by two defendants against the suit of another plaintiff cannot amount to an estoppel as between them, still less can it be held that a defendant is estopped by a plea which he does not raise, but which is raised by a co-defendant. The dismissal of the creditor's suit on the appellant's plea, does not then estop the respondent from questioning the truth of the plea.

Nor is the decree of 1861 a bar to the suit. The question now raised is whether or not the respondent suffered judgment to go by default in that suit on the understanding that the decree would not be executed without his consent, or, if executed, that the property would be restored to him. This neither was, nor could have been, determined in the former suit; consequently, the respondent is not estopped by the decree of 1861. But, if it be held that he is so far bound by the decree, that he cannot contend that the appellant was not entitled to possession in virtue of the mortgage and foreclosure, the respondent is, in our judgment, entitled to insist upon the agreement, and on the strength of it to recover back possession from the appellant, unless he is precluded by the plea which we have still to determine.

The doctrine that *in pari delicto potior est conditio possidentis*, or that the Court finding a man embarrassed by a deceit, to which he was himself a party, will not interfere to relieve him from the consequences, must not be accepted without qualification. The English Court of Exchequer in *Bowes v. Foster* (27, L. J., N. S., 262), allowed a plaintiff to recover from the defendant goods which he had deposited with [412] the defendant, in order to defeat or hinder the claims of creditors who might sue out execution, although the plaintiff had, for the purpose of deceit, furnished the defendant with evidence of a sale by handing to him a priced invoice of the goods and a receipt for the price; the Court held that, inasmuch as in fact no sale had taken place, the plaintiff was entitled to recover. In the case before the Court, the respondent furnished the appellant with a deed of conditional sale which did not, by itself, operate to pass the property in the lands therein mentioned, the foreclosure made the sale absolute, the decree awarded possession, but had not the decree been

executed, the property would have remained the property of the respondent ; the parties *ex-hypothesi*, did not intend that the property should pass, but that by the deed, foreclosure, and decree, a semblance of title should be created in the appellant. If this be so, the case before us does not appear distinguishable from *Bowes v. Foster* (27 L. J., N. S., 262), but, if it be distinguishable, on the ground that by the deed, foreclosure, or decree, or by all of them, the property passed, then, it appears to us, the respondent is entitled to rely on the agreement. The respondent may then say, let it be granted that a conditional sale was executed in favour of the appellant, that a right of foreclosure was about to accrue to him, he promised me that if I consented to allow the foreclosure to proceed, and a decree in the subsequent suit to pass by default, he would not execute the decree, or if he did execute it, he would deliver possession to me. I accordingly neither opposed foreclosure, nor pleaded to the suit, and I now claim re-delivery of the property. It appears to us that, under such circumstances, the parties could not be held to be *in pari delicto*, and the respondent would be entitled to succeed.

We have arrived at this conclusion, not without considerable hesitation, and if the value of the property is sufficient, and the appellant desires it, we consider that leave to appeal to the Privy Council should be granted. We affirm the decree of the Court below, but, under the circumstances, we direct each party to bear his own costs.

Decree affirmed.

NOTES.

[**1 RELIEF WHEN FRAUD HAS BEEN EXECUTED—**

This case has not been generally followed ; and no relief is afforded where the fraudulent purpose has been carried out :—(1908) 31 Mad. 485; (1887) 11 Bom. 709; (1878) 3 Bom. 30; (1898) 28 Bom. 406; (1899) 27 Cal. 231; (1906) 33 Cal. 967; (1887) 1 C. P. L. R. 50.

2. LIMITATION—

On the point as to limitation, *See* (1891) 16 Bom. 186; (1882) 6 Mad. 54.]

[418] FULL BENCH.

The 13th July, 1877.

PRESENT :

SIR ROBERT STUART, K.T., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, MR. JUSTICE SPANKIE, AND
MR. JUSTICE OLDFIELD.^{*}

The Empress of India

versus

Kanchan Singh.

Act X of 1872, ss. 4, 296—Definition of sessions case—Power of Sessions Court.

The appellant after his discharge by the Assistant Magistrate, upon a charge under s. 457 of the Indian Penal Code, was committed to the Sessions Court by order of the Sessions Judge under the Criminal Procedure Code, 1872, s. 296†, upon charges under ss. 380 and 457‡ of the Penal Code.

Held by the Full Bench (Spankie and Oldfield, JJ., dissenting) that the commitment was illegal, and that "session case" within the meaning of s. 296 of the Code of Criminal Procedure, is a case exclusively triable by the Court of Sessions.

* Criminal appeal—from an order of G. E. Watson, Esq., Sessions Judge of Mainpuri, dated the 9th March 1877.

† [Sec. 296 :—If the Court of Session or Magistrate of the District is of opinion that the Judgment or order is contrary to law, or that the punishment is too severe or is inadequate, such Court or Magistrate may report the proceedings for the orders of the High Court.

Provided that, in session cases, if a Court of Session or Magistrate of the District considers that a complaint has been improperly dismissed, or that an accused person has been improperly discharged, by a Subordinate Court, Sudr Court or Magistrate may direct the accused person to be committed for trial.]

‡ [S. 380 :—Whoever commits theft in any building, tent, or vessel, which building, tent, or vessel, is used as a human dwelling, or for the custody of property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Sec. 457 :—Whoever commits lurking house-trespass by night, or house breaking by night in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years.]

KANCHAN SINGH, who was convicted of theft and lurking house trespass in order to the commission of an offence, by the officiating Sessions Judge of Mainpuri, appealed to the High Court on the ground that the trial in the Sessions Court held upon the Sessions Judge's order to the Magistrate to commit the case to the Sessions Court, after the said Magistrate had discharged the prisoner, was invalid because the Court of Sessions had no power to order a commitment in the case of offences under ss. 380 and 457 of the Indian Penal Code, which are offences not exclusively triable by the Court of Sessions, and therefore do not come within the meaning of "session cases" in s. 296 of the Code of Criminal Procedure.

Pearson, J., referred the question to a Full Bench for decision in the following order of reference:—

It appears that in the case of Huria and others (unreported, decided on the 20th January 1877), Mr. Justice SPANKIE has ruled contrary to the ruling of the 26th May 1873 (H. C. R., N.-W. P., 1873, p. 168), and that in the case of Charles John Sibold (unreported, decided on the 9th April 1875) the learned Chief Justice has expressed an opinion that it is erroneous. It is, however, supported by the ruling of the Calcutta Court, dated 17th February 1874, *Jaykaram Singh, and another, petitioners, v. Man Pathack*, and by the ruling of the Madras Court, dated the [414] 5th November 1873 (Mad. H. C. R., 1871-74, p. 28 of Rulings). That the point in question may be definitively settled, and conflicting rulings be avoided in future, I refer it to a Full Bench.

Mr. Leach for appellant, the Petitioner.

The Junior Government Pleader (Baboo Dwarka Nath Banarji) for the Crown.

The following Judgments were delivered by the Court:—

Stuart, C.J.—In this reference the question is whether the Sessions Judge of Mainpuri was justified in ordering a commitment to this Court on a charge under ss. 457 and 380 of the Indian Penal Code*, as being a "session case" within the meaning of s. 296 of the Criminal Procedure Code, read in connection with s. 4 of the same Code, where the expression "session case" is defined. The procedure which gave rise to the appeal to this Court, and the question submitted by this reference, appear to be as follows:—The appellant, Kanchan Singh, and another accused person, named Mathri, were brought up before and tried by the Assistant Magistrate on a charge under s. 457 of the Indian Penal Code, with the result of Mathri's conviction and the appellant's discharge. The discharge of the appellant, Kanchan Singh, being unsatisfactory to the Sessions Judge, he ordered a commitment to the Sessions Court and the appellant was committed, tried, and convicted there accordingly. The validity of such order of commitment is one of the pleas in appeal.

In s. 4 of the Criminal Procedure Code the following is the definition of a "session case." "Session case means and includes all cases specified in column seven of the fourth schedule to this Act as cases triable by a Court of Session, and all cases which Magistrates commit to a Court of Session, although

* [q. v. supra 1 All. 418.]

they might have tried them themselves." Now if we had nothing else to consider than the true construction of this section itself, our task would be an easy one, and here I must say that we are not much assisted by some of the remarks made by Mr. Justice JARDINE in the case mentioned in the present reference (H. C. R., N.-W. P., 1873, p. 168). In the report of his judgment he is made to say that the words "triable by a Court of Session in s. 4 must be read as if they had been printed in inverted [416] commas," but, in my opinion, it is not legitimate to interpret laws in this manner, whether by the importing of words of limitation, or extension, or fanciful punctuation. If the inverted commas had been used as suggested, the meaning and application of s. 4 would have been altogether changed from what it is in its present shape. I could understand the suggestion that these words "triable by a Court of Session" might, with advantage, have been imported into s. 296 immediately after the words "session case," but it is altogether beside the rules of legal construction to attempt to interpret such a section as s. 4 by such a device. Then, again, I must express my dissent where Mr. Justice JARDINE says it is "on principle wrong that a Session Judge should have power to order a committal in spite of a discharge by a Magistrate, who had himself full power to try and acquit. Where the Magistrate's powers are restricted to preliminary enquiry, it is reasonable that the Session Court should have power to control the result of that enquiry. But where the Magistrate could pass a final order of acquittal, I see no reason for giving the Session Court power to disturb this order, because it takes the form of a discharge." On the contrary, I do not only see nothing wrong on principle, but, judging from my own experience in criminal cases in this Court, it would, I consider, be very convenient and advantageous if Session Judges had such a power of correction and control over their Magistrates. But all these speculations and fanciful views of legal interpretation are really beside the question of the true construction of s. 4, nor are they necessary to the elucidation of s. 296, * the correct application of which, in my view, depends, at least so far as the present case is concerned, on a much simpler test, which I do not find noticed neither in the judgment of Mr. Justice JARDINE, or in any of the other authorities which have been referred to. As to s. 4 itself, anything more simple or more obvious in meaning than the language of that section I cannot imagine. It very plainly provides that "session case" means and includes all cases triable by a Court of Session itself, that is, if you prefer it, by a Court of Session only, or exclusively, and also all cases which Magistrates commit to a Court of Session for trial. These are the two classes of cases which by s. 4 are to be understood as session cases, the one neither more nor less so, than the [416] other. Nor is the definition, given in this s. 4 of a Magistrate's case in the slightest degree inconsistent with such a definition of a session case. A Magistrate's case, the section says, means and includes all cases triable by Magistrates, and all cases which Magistrates try themselves, although they might have committed them for trial to a Court of Session, being the very cases which, when committed to a Court of Session, become *ipso facto* session cases.

* [Sec. 296 :—If the Court of Session or Magistrate of the District is of opinion that the Judgment or order is contrary to law, or that the Report to High Court. punishment is too severe or is inadequate, such Court or Magistrate may report the proceedings for the orders of the High Court.

Provided that, in session cases, if a Court of Session or Magistrate of the District considers that a complaint has been improperly dismissed, or that an accused person has been improperly discharged, by a Subordinate Court, Sudr Court or Magistrate may direct the accused person to be committed for trial.]

In fact it comes to this, that by s. 4 the term "session case" applies to cases triable by a Court of Session alone, and also all other cases (doubtful cases as Mr. Justice JARDINE calls them, although why they should be so described I cannot see), in which the Court of Session has, by force of the commitment to it, concurrent jurisdiction with the Magistrate.

Such are the observations suggested to me by the consideration of s. 4 taken by itself, and without reference to any other part of the Criminal Procedure Code. But when we come to s. 296, we find it necessary to understand a session case in a more limited sense. The second part of that section provides that "in session cases, if a Court of Session or Magistrate of the district considers that a complaint has been improperly dismissed, or that an accused person has been improperly discharged by a Subordinate Court, such Court or Magistrate may direct the accused person to be committed for trial upon the matter of such complaint, or of which the accused person has been, in the opinion of the Court or Magistrate, improperly discharged." Now there can be no doubt that this section strictly and literally applies to cases triable by the Court of Session itself, but does it apply to these cases exclusively and not to the second class of session cases which s. 4 defines? The answer to this question is supplied by the definition given in s. 4 of the other class of session cases, namely, those which Magistrates commit for trial to the Court of Session. The word "commit" is, I consider a governing word in this sentence, and everything depends upon its right construction. If it could be taken to mean "may commit," then unquestionably s. 296 would let in these Magistrates' cases were a commitment had not been made. But as I view this part of s. 4, the fact of the committal to the Court of Session is the essential quality of such session cases. On the other hand, the remedy provided by s. 296 assumes that there had been no previous [417] commitment to the Court of Session at all, and the Judge is simply empowered, in that state of things, to order a commitment. It follows, therefore, that such remedy cannot contemplate the second class of session cases defined by s. 4, for there, as I have pointed out, commitment to the Court of Session, as a fact and proceeding already completed, is assumed or taken for granted, and no other or further order of commitment is necessary, or, from the nature of the case, possible. Any other view would involve the absurdity of the Sessions Judge ordering a commitment which has already been made to the Sessions Court by the Magistrate himself. In fact in no view of it can s. 296 be read as applicable to a Magistrate's case, and the question of commitment or no commitment is immaterial, for if the Magistrate did not commit the present case to the Court of Sessions, and he in fact did not, then the case is not a session case within the meaning of s. 4, while if he did commit, there was no necessity and no reason for any other commitment, whether by the Judge's order or otherwise. The result, therefore, is that the session cases referred to in s. 296 are session cases triable by the Court of Session only, and the present case being a Magistrate's case, and not one triable by the Court of Session only, the Judge's order to commit it was illegal.

I think it unnecessary to make any further remarks on the rulings referred to in the order of reference. In my own judgment in the case of *Sibold* (unreported, decided on 9th April 1874) I do not appear to have entered into the question very fully, and I remark that the case in which Mr. Justice JARDINE'S ruling was made was different from the one then before me, and in the glance I then gave to the matter, I may not have sufficiently considered the phraseo-

logy of s. 4. As to the Calcutta *Jay Karan Singh v. Man Pathack*, (17th February 1875), and Madras (7 Mad. H. C. R., 1871-74, p. 28 of Rulings) cases, they appear to have been properly disposed of; although I observe that the Calcutta judgment *Jay Karan Singh v. Man Pathack*, (17th February 1874), simply repeats Mr. Justice JARDINE's argument, and the Madras ruling appears to have been made by the Court itself, on a reference to it, without any argument from the bar.

[418] Pearson, J.—I concurred at the time in the ruling (on the 26th May 1873) by the late Mr. Justice JARDINE in the case of the *Queen v. Sital Prasud* (H. C. R., N.-W. P., 1873), and on further consideration I see no good ground for questioning its correctness. The reasons assigned by him in support of it are, in my opinion, as conclusive as they are well nigh exhaustive. Little has been left by him to be said on the subject. The terms used in the designation of a session case in s. 4 of Act X of 1872 "all cases specified in column seven of the fourth schedule to this Act as triable by a Court of Session," are not synonymous with all cases triable by a Court of Session. We find various specifications in the seventh column of the schedule; some cases are specified as triable by a Court of Session; others as triable by a Court of Session or by a Magistrate of the first class; others again as triable by a Magistrate of the first or second class; others as triable by any Magistrate, and so on. Evidently, as it seems to me, those simply specified as triable by a Court of Session, which are triable by that Court exclusively, are those indicated in the first part of the definition as session cases.

The definition of a session case is followed by the definition of a Magistrate's case for the purpose of distinguishing the one from the other. The two definitions comprehend all triable cases and, read together, explain one another.

There are many cases which a Magistrate may either try himself or commit for trial to a Court of Session; and the definitions declare such cases, if tried by the Magistrate, to be Magistrate's cases, and if committed to the Court of Session, to be session cases.

Session cases, therefore, include along with cases exclusively triable by a Court of Session, and Magistrate's cases include along with cases exclusively triable by Magistrates, cases triable by them or by a Court of Session, which they, in the exercise of their discretion, elect to try themselves.

The ruling gives full effect and meaning to every part of the definitions, and is perfectly consistent with, and agreeable to them. There is, too, much force and pertinence in the remark that "it seems, on principle, to be wrong that a Sessions Judge should have power to order a committal in spite of a discharge by a Magistrate [419] who had himself powers to try and acquit. Where the Magistrate's powers are restricted to preliminary enquiry, it is reasonable that the Session Court should have power to control the result of that enquiry. But where the Magistrate could pass a final order of acquittal, I see no reason for giving the Session Court power to disturb that order because it takes form of a discharge."

The case out of which the present reference has arisen is, according to the ruling in question, a Magistrate's case. It is not a case exclusively triable by a

Court of Session, nor was it committed to that Court. It was triable by a Court of Session or by a Magistrate of the first or second class; and was tried and disposed of by a Magistrate. To rule that this is a sessions case on the ground that the terms before quoted in the definition of a session case do not mean cases exclusively triable by a Court of Session, but include cases triable by a Court of Session and a Magistrate, would lead to this result, that all cases triable by a Court of Session, or a Magistrate, are both sessions cases and Magistrate's cases: and would thus confound what the definitions were carefully designed to distinguish.

Turner, J.--It appears to me that the definitions of " Sessions case " and " Magistrate's case," respectively, must be read together, and that so read, all difficulty in their construction disappears.

There are some cases specified in the schedule as triable by a Court of Session, there are others specified in the schedule as triable by Magistrates, again, there are cases specified as triable either by a Magistrate or a Court of Session, and lastly, there are cases in which, though ordinarily triable by a Magistrate, an accused person, if he be an habitual offender, may be committed to the Court of Session.

Now in order to bring all these classes under two heads, the definitions, as I understand them, declare that sessions cases mean and include all cases triable by a Court of Session exclusively, and all cases of the classes in which jurisdiction is given to the Sessions Court, or to the Magistrate if the Magistrate elects to commit them, and that Magistrate's case means and includes all cases specified as triable by Magistrate exclusively, and also all cases of those classes [420] in which jurisdiction is given to the Court of Session or the Magistrate, if the Magistrate elects to try himself. If the other construction be adopted, and the term triable by a Court of Session in the first definition, be held to include cases triable by the Court of Session or the Magistrate, a case of that class tried by a Magistrate will fall under both definitions and the anomaly will arise which was pointed out by Mr. Justice JARDINE in *Regina v. Sital Prasad* (H. C. R., N.-W. P., 1873, p. 168) that a Sessions Judge may order a committal if the Magistrate discharges an accused person whom he had power to try and acquit, when the Sessions Judge cannot interfere to set aside an acquittal, except on the appeal of the Government. Seeing that the construction adopted by Mr. Justice JARDINE has approved itself to the High Courts of Calcutta and Madras, I am the more confident in accepting it.

Spankie, J.—(after quotation of ss. 4 and 296^{*} of Act X of 1872 continued):-

It is contended that a sessions case means a case triable by the Court of Session only.

* [Sec. 296 :—If the Court of Session or Magistrate of the District is of opinion that the Judgment or order is contrary to law, or that the Report to High Court. punishment is too severe or is inadequate, such Court or Magistrate may report the proceedings for the orders of the High Court.

Provided that, in session cases, if a Court of Session or Magistrate of the District considers that a complaint has been improperly dismissed, or that an accused person has been improperly discharged, by a Subordinate Court, Sudr Court or Magistrate may direct the accused person to be committed for trial.]

The late Mr. Justice JARDINE in this Court (H. C. R., N.-W. P., 1873, p. 168) held that the words "triable by a Court of Session" in s. 4 must be read as if they had been printed in inverted commas. This he considered would limit the meaning of "cases specified" as triable by a Court of Session alone. This view was supported by a consideration of the two definitions together. We might expect, the learned Judge remarked, that "the two would just cover all possible cases, and this upon the view above expressed is found to be the fact. Sessions cases include all those which the Court of Session alone can try, and such as are committed to the Court of Session. Magistrates' cases include all those which only Magistrates are to try, and so many of the doubtful cases as the Magistrates do, in fact, try themselves. It seems, moreover, on principle to be wrong that a Sessions Judge should have power to order a committal in spite of a discharge by a Magistrate who had himself full power to try and acquit; when the Magistrate's powers are restricted to preliminary enquiry, it is reasonable that the Sessions Court should have power [421] to control the result of that enquiry. But where the Magistrate could pass a final order of acquittal, I see no reason for giving the Sessions Court power to disturb his order, because it takes the form of discharge." It appears that Mr. Justice PEARSON holds the same views, and that the Calcutta (*Jay Karan Singh v. Man Pathak*, 7th February 1874), and Madras (Mad. H. C. R., 1871-74, p. 28 of Rulings), Courts have ruled to the same effect, that the Sessions Court can only order committal in cases exclusively triable by itself.

Referring to s. 4, I find nothing to support the view that sessions case means cases exclusively triable by a Court of Session. But I do find in the plainest language possible, that a sessions case means and includes all cases specified in column seven of the fourth schedule as cases triable by a Court of Session, and all those cases which Magistrates commit to a Court of Session, although they might have tried them themselves.

It is true that on reading the definition of a Magistrate's case, it would at the first glance seem that until a Magistrate had actually committed a case which he could have tried himself, it would not become a sessions case. But this construction would only hold good for the purpose of defining what is a Magistrate's case, and what a sessions case, and of so far regulating the exercise of their concurrent jurisdiction. This construction, however, does not necessarily limit the power of revision given by s. 296* to the Sessions Judge and District Magistrate. These words "sessions case" and "Magistrate's case" are only to be met with twice, respectively, in the Code, in ss. 4, 296, and 74. In s. 74,

* [Sec. 296:—If the Court of Session or Magistrate of the District is of opinion that the judgment or order is contrary to law, or that the punishment is too severe or is inadequate, such Court or Magistrate may report the proceedings for the orders of the High Court. Report to High Court.]

Provided that, in sessions cases, if a Court of Session or Magistrate of the District considers that a complaint has been improperly dismissed, or that an accused person has been improperly discharged, by a Subordinate Court, such Court or Magistrate, may direct the accused person to be committed for trial.]

Magistrates of the 1st Class, being European British subjects, and Justices of the Peace, may inquire into complaints against European British subjects.

When such Magistrate may try, and extent of his jurisdiction.

[Sec. 74:—Any competent Magistrate may inquire into complaints of any offence made against a European British subject.

If the offence complained of is a Magistrate's case and can, in the opinion of such Magistrate, be adequately punished by him, he shall proceed as is hereinafter in this Code directed, according to the nature of the offence; and, on conviction, may pass on such European British subject any sentence warranted by law, not exceeding three months' imprisonment, or fine, up to one thousand rupees, or both.]

which deals with offences committed by European British subjects, the words "a Magistrate's case" clearly refer to a case which is specified in column seven, schedule four, as triable by a Magistrate, which might be sent to the Sessions, but which the Magistrate is *not* to send to the Sessions, if he thinks that he can adequately punish it by any sentence warranted by law, not exceeding three months' imprisonment or a fine up to one thousand rupees, or both. If he thinks that he cannot adequately punish it under s. 74, then he must commit to the Sessions Court, or High Court, as the case may be, under s. 75[‡]. This, it is true, is a special part of the Code applying [422] to European British subjects alone. But when we examine chapter XV and ss. 89[†], 195[†], and 196[†], we find in the first section that the procedure to be adopted refers to cases triable (not exclusively triable) by a Sessions Court or High Court. By s. 195, a Magistrate can discharge an accused person, if he thinks there is no ground for committing him, and dispose of the case himself under

*[Sec. 75 :—When the offence complained of cannot, in the opinion of such Magistrate, be adequately punished by him, and is not punishable with death or with transportation for life, such Magistrate shall, if he thinks that the accused person ought to be committed, commit him to the Court of Session.

When commitment is to be to Court of Session.

When commitment is to be to High Court.

When the offence complained of is punishable with death or transportation for life, the commitment shall be to the High Court.]

†[Sec. 89 :—Every person aware of the commission of any offence made punishable under sections one hundred and twenty-one, one hundred and twenty-one A, one hundred and twenty-two, one hundred and twenty-three, one hundred and twenty-four, one hundred and twenty-four A, one hundred and twenty-five, one hundred and twenty-six, one hundred and thirty, three hundred and two, three hundred and three, three hundred and four, three hundred and eighty-two, three hundred and ninety-two, three hundred and ninety-three, three hundred and ninety-four, three hundred and ninety-five, three hundred and ninety-six, three hundred and ninety-seven, three hundred and ninety-eight, three hundred and ninety-nine, four hundred and two, four hundred and thirty-five, four hundred and thirty-six, four hundred and forty-nine, four hundred and fifty, four hundred and fifty-six, four hundred and fifty-seven, four hundred and fifty-eight, four hundred and fifty-nine, or four hundred and sixty of the Indian Penal Code, shall in the absence of reasonable excuse, the burthen of proving which shall lie upon such person, give information of the same to the nearest Police officer or Magistrate.]

All persons to give information of certain offences.

When a Magistrate finds that there are not sufficient grounds for committing the accused person to take his trial before the Court of Session or High Court, or for remanding him, he shall discharge him, unless it appears to the Magistrate that such person should be put on his trial before himself, in which case he shall proceed under Chapters XVI, XVII, or XVIII of this Act.

When accused person to be discharged.

When a Magistrate finds that there are not sufficient grounds for committing the accused person to take his trial before the Court of Session or High Court, or for remanding him, he shall discharge him, unless it appears to the Magistrate that such person should be put on his trial before himself, in which case he shall proceed under Chapters XVI, XVII, or XVIII of this Act.

Explanation I.—The absence of the complainant except when the offence may lawfully be compounded, shall not be deemed sufficient ground for a discharge, if there appear other evidence of a nature rendering a trial desirable.

Explanation II.—A discharge is not equivalent to an acquittal, and does not bar the revival of a prosecution for the same offence.

Explanation III.—An order of discharge cannot be made until the evidence of the witnesses named for the prosecution has been taken.

§ [Sec. 196 :—When evidence has been given before a Magistrate which appears to justify him in sending the accused person to take his trial for an offence which is triable exclusively by the Court of Session or High Court, or which, in the opinion of the Magistrate, is one which ought to be tried by such Court, the accused person shall be sent for trial by such Magistrate before the Court of Session or High Court as the case may be.]

chapters XVI, XVII or XVIII, as the case may be. By s. 196 * if the Magistrate considers that the evidence justifies commitment for an offence exclusively triable by the Court of Session or High Court, he is to make the commitment to such Court, and he is to do the same, if he thinks that the case is one which ought to be tried by the Sessions Court, though it be not an offence exclusively triable by the Sessions Court. The section is mandatory where the case is exclusively triable by the Sessions Court, and permissive in other cases. But here we have *exclusively* used for a purpose; we shall find in s. 296, which deals with discharge under s. 195, no such use of the word at all. Section 296 † refers to the superintendence of the Subordinate Courts by the Sessions Judge and Magistrate of the district, and to the revision which they may exercise. The first para. provides for the report of cases to this Court in which the judgment or order is contrary to law, or the punishment too severe or inadequate. The second para. provides, that in sessions cases, if a Court of Session or Magistrate of the district considers that a complaint has been improperly dismissed, or that an accused person has been improperly discharged by a Subordinate Court, such Court or Magistrate may direct the accused person to be committed for trial. Now here we go back to the definition of a sessions case, and find that there is no such limit in s. 4, as that contended for, *viz.*, that those cases only are sessions cases which can be tried by the Sessions Court alone. All those cases in fact are sessions cases which are specified in column seven of the fourth schedule as triable by the Court of Session, including all the cases which Magistrates commit to a Court of Session, though they might have tried them themselves. They are all cases specified in column seven, schedule four, and are triable by the Court of Session, though, if the Magistrate tries those himself which are within his jurisdiction to punish, they are not sent up to the Sessions. But they are not the less [423] sessions cases, though they are within certain limits jointly triable by the Sessions Court and Magistrate of the first class, and because they are so, both the Sessions Court and the Magistrate of the district have the power to revise improper dismissal of complaints and discharges ordered by the Subordinate Magistrates.

This superintendence is part of their office. They are in a certain degree responsible for the proper discharge by their subordinates of their judicial duties. All the Magistrates are subordinate to the Magistrate of the district, but neither the Magistrate of the district nor the Subordinate Magistrates are subordinate to the Sessions Judge, except to the extent and in the manner

* [Sec. 196 :—When evidence has been given before a Magistrate which appears to justify him in sending the accused person to take his trial for an offence

When accused is to be committed for trial. which is triable exclusively by the Court of Session or High Court, or which, in the opinion of the Magistrate, is one which ought to be tried by such Court, the accused person shall be sent for trial by such Magistrate before the Court of Session or High Court as the case may be.]

† [Soc. 296 :—If the Court of Session or Magistrate of the District is of opinion that the judgment or order is contrary to law, or that the punishment is too severe or is inadequate, such Court or Magistrate may report the proceedings for the orders of the High Court.

Provided that, in sessions cases, if a Court of Session or Magistrate of the District considers that a complaint has been improperly dismissed, or that an accused person has been improperly discharged, by a Subordinate Court, such Court or Magistrate, may direct the accused person to be committed for trial.]

provided by the Act (s. 37)*. Under the old Act the subordination of the Magistrate to the Magistrate of the district was not clearly recognised, and 38 g.^t was added by s. 4 of Act VIII of 1869. So by s. 435^f of the old Act, the Sessions Judge only could order commitment of an accused person, if he was charged with an offence triable by the Sessions Court exclusively. But the section was altered by s. 4, Act VIII of 1869, and he has now the power of doing so in cases in column seven, schedule four, not only triable by himself, but also by the Magistrate of the district. The Magistrate of the district also had the power of directing commitment or inquiry when the Magistrate who had discharged the accused person or dismissed his complaint without any investigation, was a subordinate Magistrate. But under the old Act, subordinate Magistrates were of two classes only, one with powers up to six months, and the other up to one month, as provided by s. 22^s of Act XXV of 1861. Under the present Act there are three classes of Magistrates, and all are subordinate to the Magistrate of the district. Thus, it became necessary, all Magistrates being subordinate to the Magistrate of the district, to enlarge the powers of that officer as a Court of superintendence and revision, and so both the Court of Session and the Magistrates of districts were empowered by the second para., s. 296, to direct a committal where a complaint had been improperly

*[Sec. 37 :—The Local Government may appoint as many other persons besides the Subordinate Magistrates. Magistrate of the District, as it thinks fit, to be Magistrates of the first, second or third class in the District.

All such Magistrates shall be subordinate to the Magistrate of the District, but neither the Magistrate of the District, nor the Subordinate Magistrates shall be subordinate to the Sessions Judge, except to the extent and in the manner provided by this Act.

The Local Government shall not have power to direct that any Magistrate may try any offence which Magistrates of his class are not authorized to try, or pass any sentence which Magistrates of his class are not authorized to pass by section twenty.]

Proviso.

Subordination of all Magistrates to the Magistrate of the District.

[Sec. 23 (G):—Except as otherwise provided in this Act or by any other law, for the time being in force, all Magistrates and Subordinate Magistrates shall be subordinate to the Magistrate of the District in which they exercise jurisdiction.]

† [Sec. 435 :—In case of offences not triable by the Magistrate, the Court of Session may order the commitment to the Court of Session of any accused person who may have been discharged by the Magistrate. In the case of such offences the Court of Session may order an enquiry into any complaint which the Magistrate may have dismissed without enquiry.]

When Court of Session may order commitment of party discharged by Magistrate.

By what Courts, the offences mentioned in the schedule are triable, and within what limits such Courts may pass sentence.

§[Sec. 22:—The offences mentioned in the schedule annexed to this Act shall, subject to the provision contained in the third explanatory note prefixed to the said schedule, be triable by the Courts specified in column 7 of the said schedule, and such Courts shall be competent to pass sentence in respect of such offences within the following limits (that is to say):—

The Court of session. Death (subject to confirmation by the Sudder Court). Transportation, imprisonment of either description for a period not exceeding fourteen years, including such solitary confinement as is authorized by law, or fine to an unlimited amount, or both transportation and fine, or imprisonment and fine in cases in which both punishments are authorized by the Indian Penal Code. In cases in which, according to

dismissed, or an accused person improperly discharged, in sessions cases. If we are to accept the view contended for by the appellant, then the alterations as regards this power of revision, made since Act XXV 1861 was passed, would have no meaning, and there would be no [424] reason for the omission of such words as exclusively triable by the Court of Session, which have no place in s. 4 and s. 296* of the present Code.

There is nothing opposed to principle in allowing this power of revision to the Court of Session and District Magistrate. A Magistrate of the first class

the Indian Penal Code, forfeiture of property may be adjudged, the Court of Session may adjudge such forfeiture in addition to the sentence.

Assistant Sessions Judges In the Presidency of Bombay it shall be lawful for a Sessions Judge to delegate cases for trial by an Assistant Sessions Judge : and such Assistant Sessions Judge shall be competent in such cases to pass sentences within the following limits :—Imprisonment of either description for a term not exceeding seven years (including such solitary confinement as is authorized by law), or fine or both. If the sentence be one of imprisonment for a term exceeding three years, it shall be passed subject to confirmation by the Sessions Judge. The Sessions Judge may review and hear appeals, against the proceedings of his Assistants, and may confirm and amend (but not so as to enhance) or may reverse their sentences or orders. It shall not be competent to an Assistant Sessions Judge to review or hear an appeal against the proceedings of a Magistrate.

Powers of the Magistrate The Magistrate of the District or other Officer authorised to exercise the powers of a Magistrate. Imprisonment of either description not exceeding the term of two years, including such solitary confinement as is authorised by law, or fine to the extent of one thousand Rupees, or both imprisonment and fine in all cases in which both punishments are authorised by the Indian Penal Code.

Subordinate Magistrates or Officers authorised to exercise any of the powers of a Magistrate :—

Powers of Subordinate Magistrates, 1st class. 1st Class. Imprisonment of either description not exceeding six months, or fine not exceeding two hundred Rupees, or both imprisonment and fine in all cases in which both punishments are authorized by the Indian Penal Code.

2nd Class. Imprisonment of either description not exceeding one month, or fine, not exceeding fifty Rupees, or both imprisonment and fine in all cases in which both punishments are authorised by the Indian Penal Code.

No sentence of solitary confinement, under Section 73 of the Indian Penal Code, shall be passed by any Court inferior to an Officer exercising the powers of a Magistrate.]

*[Sec. 296 :—If the Court of Session or Magistrate of the District is of opinion that the judgment or order is contrary to law, or that the punishment is too severe or is inadequate, such Court or Magistrate may report the proceedings for the orders of the High Court.

Provided that, in sessions cases, if a Court of Session or Magistrate of the District considers that a complaint has been improperly dismissed, or that an accused person has been improperly discharged by a Subordinate Court, such Court or Magistrate may direct the accused person to be committed for trial.]

may improperly discharge an accused person under s. 195*, that is to say, in cases triable by a Court of Session, even though he may have, under the provisions of that section, proceeded under Chapters XVI and XVII, or XVIII. If the Magistrate of the district or Court of Session considered that there were sufficient grounds for commitment, then the accused would have been improperly discharged. Where a Magistrate improperly discharges an accused person under s. 215†, the High Court can order him to be tried or committed for trial; a discharge is not equivalent to an acquittal under either section. The Sessions Court is empowered to guard against a miscarriage of justice in cases triable by itself. The High Court has plenary power in all cases of improper discharge. No question of acquittal is applicable to the point before us. An acquittal may be appealed against by the Government. This is an exclusive privilege of Government. But private prosecutors, so to speak, have no other remedy but that afforded by ss. 296‡ and 297§ of the Code.

* [Sec. 195 :—When a Magistrate finds that there are not sufficient grounds for committing the accused person to take his trial before the Court of Session or When accused person to High Court, or for remanding him, he shall discharge him, unless it appears to the Magistrate that such person should be put on his trial before himself, in which case he shall proceed under chapters XVI, XVII, or XVIII of this Act.

Explanation I.—The absence of the complainant except when the offence may lawfully be compounded, shall not be deemed sufficient ground for a discharge, if there appear other evidence of a nature rendering a trial desirable.

Explanation II.—A discharge is not equivalent to an acquittal, and does not bar the revival of a prosecution for the same offence.

Explanation III.—An order of discharge cannot be made until the evidence of the witnesses named for the prosecution has been taken.]

†[Sec. 215 :—When the evidence of the complainant and of the witnesses for the prosecution, and such examination of the accused person as the Discharge of accused. Magistrate considers necessary, have been taken, the Magistrate if he finds that no offence has been proved against the accused person, shall discharge him.

Explanation I.—The absence of the complainant, except where the offence may be lawfully compounded, shall not be deemed sufficient ground for a discharge, if there appear other evidence sufficient to substantiate the offence.

Explanation II.—A discharge is not equivalent to an acquittal, and does not bar the revival of a prosecution for the same offence.

Explanation III.—An order of discharge cannot be passed until the evidence of the witnesses named for the prosecution has been taken.]

‡[Sec. 296 :—If the Court of Session or Magistrate of the District is of opinion that the judgment or order is contrary to law, or that the punishment is Report to High Court. too severe or is inadequate, such Court or Magistrate may report the proceedings for the orders of the High Court.

Provided that, in sessions cases, if a Court of session or Magistrate of the District considers that a complaint has been improperly dismissed, or that an accused person has been improperly discharged by a Subordinate Court, such Court or Magistrate may direct the accused person to be committed for trial.]

Powers of revision. §[Sec. 297 :—If in any case either called for by itself or reported for orders, or which comes to its knowledge, it appears to the High Court that there has been a material error in any

Being of opinion that it is not for us, who administer the law, to import into s. 4 and s. 296* of the Act, the words "exclusively" triable, or by the Court of Session "alone," I would answer the reference by saying that the Sessions Judge had the power to order the committal.

judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence or order thereon as it thinks fit.

Power to order commitment.

If it considers that an accused person has been improperly discharged, it may order him to be tried, or to be committed for trial;

If it considers that the charge has been inconveniently framed, and that the facts of the case show that the prisoner ought to have been convicted of

Power to alter finding and sentence.

an offence other than that of which he was convicted, it shall pass sentence for the offence of which he ought to have been convicted;

Provided that, if the error in the charge appears materially to have misled and prejudiced the accused person in his defence, the High Court shall annul the

Proviso as to power of altering finding.

conviction, and remand the case to the Court below, with an amended charge, and the Court below shall thereupon proceed as if it had itself amended such charge;

Power to annul conviction.

If the High Court considers that any person convicted by a Magistrate has committed an offence not triable by such Magistrate, it may annul the trial and order a new trial before a competent Court;

If it considers that the sentence passed on the accused person is one which cannot legally be passed for the offence of which the accused person has been convicted,

Power to annul improper, and to pass proper sentence.

or might have been legally convicted upon the facts of the case, it shall annul such sentence and pass a sentence in accordance with law.

If it considers that the sentence passed is too severe, it may pass any lesser sentence warranted by law; if it considers that the sentence is inadequate, it may pass a proper sentence.

The High Court may, whenever it thinks fit, order that the sentence in any case coming before it as a Court of Revision, be suspended; and that any person imprisoned under such sentence be released on bail, if the offence for which such person has been imprisoned be bailable.

Powers of revision confined to High Court.

Except as provided in sections three hundred and twenty-eight and three hundred and ninety-eight, no Court, other than the High Court, shall alter any sentence or order of any Subordinate Court, except upon appeal by the parties concerned.

Optional with Court to hear parties.

No person has any right to be heard before any High Court, in the exercise of its powers of revision, either personally or by agent, but the High Court may, if it thinks fit, hear such person either personally or by agent.]

* [Sec. 296 :—If the Court of Session or Magistrate of the District is of opinion that the judgment or order is contrary to law, or that the punishment is too severe or is inadequate, such Court or Magistrate may report the proceedings for the orders of the High Court.

Provided that, in sessions cases, if a Court of Session or Magistrate of the District considers that a complaint has been improperly dismissed, or that an accused person has been improperly discharged by a Subordinate Court, such Court or Magistrate may direct the accused person to be committed for trial.]

Oldfield, J.—I agree in the view taken by Mr. Justice SPANKIE of the question referred.

* **Order.**—In accordance with the ruling of the majority of the Full Bench, Pearson, J., passed the following final order in the above case.

The second ground is sustained by the opinion of the majority of the Full Bench. The proceedings of the Sessions Court must, therefore, be set aside as illegal, and the sentence passed on the appellant is accordingly annulled, and his release is ordered.

Conviction quashed.

NOTES.

[See 7 C. L. R., 168; 2 All., 570.]

[425] APPELLATE CIVIL.

The 19th April, 1877.

PRESENT :

MR. JUSTICE PEARSON AND MR. JUSTICE SPANKIE.

Dai Chand and others.....Defendants

versus

Safraz Ali and others.....Plaintiffs.^{*}

Acknowledgment of subsisting right—Act XIV of 1859, s. 1, cl. 815 ; Act IX of 1871, sch. ii, art. 148—Limitation—Mortgagor Mortgagee Suit for redemption—Onus probandi—Unnecessary proof of mortgage where acknowledgment was made prior to 1850.

In a suit for redemption of landed property the plaintiffs, representatives of the mortgagors, relied on an acknowledgment of the mortgagors' title contained in an entry in the settlement records of the year 1841, which was attested by the representatives of the mortgagees, defendants in the suit; and the lower Court, having differed as to whether the acknowledgment was sufficient without proof that it was made within sixty years from date of the alleged mortgage, held, that inasmuch as there was no limitation to suits for redemption of mortgage of landed property prior to Act XIV of 1859, it was unnecessary to ascertain when the mortgage was effected, the acknowledgment of 1841 being an acknowledgment of a right still subsisting, and one which fulfilled the requirement, of art. 148, sch. ii, Act IX of 1871.

THE facts connected with the present case are fully reported in the appeal to the Full Bench of the High Court (I. L. R., 1 All., 117) which confirmed the decision of the Senior Judge of the Division Bench, remanding the case to the Court of First Instance for decision on the merits.

The Senior Judge of the Division Bench, in the judgment delivered by him on the 8th April 1875, observed that whether the plaintiffs' ancestors were the mortgagors, and whether the mortgage was made by them in 1811 for a consideration of Rs. 241, were questions which would have to be determined before it could be decided whether the suit could be maintained, and that even if it were established that the plaintiffs' ancestors were the mortgagors, unless it were shown that the mortgage was not made before 1811, it might be found that the suit was barred by limitation. Relying on these observations, the Munsif who tried the case on the remand held that, notwithstanding the acknowledgment of 1841, the plaintiffs [426] were bound to prove that the mortgage was affected, as alleged in the plaint, in 1811, and that the acknowledgment of 1841 was, therefore, made within the period of sixty years allowed for redemption. Finding that the documentary evidence of settlement records in the case showed that the settlement of the lands in dispute, along with other lands, had been made from 1211 Fusli (corresponding with the year 1802-1803) with the ancestors of the defendants who then held possession, the Munsif concluded that the plaintiffs' allegation that the mortgage had been effected in 1811 had failed of proof. He, therefore, dismissed the suit on the ground that the

* Special Appeal, No. 1471 of 1876, from a decree of Rai Shankar Das, Subordinate Judge of Saharanpur, dated the 6th November 1876, reversing a decree of Rai Izzat Rai, Munsif of Muzaffarnagar, dated the 7th August 1876.

acknowledgment of 1841 was insufficient by itself to support the claim for redemption until it was shown to have been made within sixty years from the date of the alleged mortgage. The plaintiffs appealed from this decision, and the Subordinate Judge, holding that the burden of proof as to the acknowledgment of 1841 not having been made within the period of sixty years from the date of the mortgage rested upon the defendants, mortgagees, and finding that the said defendants had failed to prove when the said mortgage was effected, reversed the decision of the Munsif, and decreed the suit for redemption of the property, with costs and interest.

The defendants, in special appeal to the High Court, urged that the Subordinate Judge had wrongly placed the *onus* of proof as to the acknowledgment of 1841, it being incumbent upon the plaintiffs to show when the alleged mortgage was effected, and that the said acknowledgment was made within the statutory period, and that it was not necessary for defendants to prove that such acknowledgment did not operate to renew the period of limitation, the finding of the Subordinate Judge as to the said acknowledgment having been made within sixty years from the date of the mortgage being purely conjectural, and without any evidence on the record to show when the mortgage was effected.

Mr. Howard, Babu Jogendro Nath Chaudhri, and Lala Ram Prasad for Appellants.

Pandits Ajudhia Nath and Bishambhar Nath for Respondents.

The Judgment of the Court was delivered by

Pearson, J.—The provisions of cl. 15, s. 1, Act XIV of 1859, relating to suits against a mortgagee for the recovery of immoveable [427] property mortgaged, were modified by art. 148, sch. ii, Act IX of 1871, principally in this respect, that the acknowledgment in writing in the mortgagor's title or right of redemption, from the date of which a new period of limitation is allowed to commence, is required to be made within the period of limitation originally prescribed and reckoned from the date of the mortgage; the reason of the modification is, I conceive, discoverable by reference to s. 29 of the last-mentioned Act, which declares that at the determination of the period limited to any person for instituting a suit for possession of any land, his title to such land shall be extinguished. The intention of the Legislature was to allow a further period of limitation to run from the date of an acknowledgment, not of rights already extinct, but only of rights still subsisting.

Before the enactment of cl. 15, s. 1, Act XIV of 1859, there was no limitation to suits for the redemption of mortgage of landed property. In 1841, therefore, when the acknowledgment, found in the settlement record of that year, was made by the defendants in this suit, or their forefathers, that they held the property in suit as mortgagees, there was nothing in the law to preclude the mortgagors from suing for the redemption of the mortgage. In other words, the right acknowledged was a right not extinguished by lapse of time, but still subsisting; the acknowledgment fulfils the intention and satisfies the requisition of the clause in art. 148, sch. ii, Act IX of 1871, modifying the provisions of cl. 15, s. 1, Act XIV of 1859, and renders it unnecessary to enquire and ascertain when the mortgage, acknowledged in 1841, was actually made.

From this point of view it is immaterial whether the first two pleas in the appeal now before us are good. The plea of *res judicata* set forth in the last ground of the appeal is certainly not established.

The only question remaining for trial was whether the property in suit was mortgaged to the defendants' ancestors by the ancestors of the plaintiffs. That question has been determined in the affirmative by the Lower Appellate Court, whose finding on the point is not impugned by the special appellants.

[428] I would affirm the Lower Appellate Court's decree, and dismiss the appeal with costs.

Spankie, J.—I am of the same opinion.

Appeal dismissed.

NOTES.

[See 1 All. 117.]

[1 All. 428]

APPELLATE CIVIL.

The 8th May, 1877.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR. JUSTICE OLDFIELD.

Nehalo.....Appellant

versus

Nawal and others.....Respondents.

Act IX of 1861, ss. 1, 6—Fresh application—Guardian—Minor—Power to appoint—Previous orders not conclusive.

A Court is not precluded from entertaining a fresh application for the guardianship of a minor under s. 1[†] of Act IX of 1861 by the circumstances that a previous application of the same sort has been refused.

IN the year 1872 one Ram Dyal applied to the Judge of Meerut, under Act IX of 1861, for the custody and guardianship of a female minor, alleging that the maternal uncle, with whom the minor then resided, was not a fit and proper person to have charge of her. The Judge refused to grant Ram Dyal's application, and Ram Dyal did not appeal from this order.

The present application to the Judge was made by Musaminat Nehalo, wife of the minor's first cousin, praying that the Court would appoint the petitioner

*Miscellaneous Regular Appeal, No. 17 of 1877, from an order of H. W. Dashwood, Esq., Judge of Meerut, dated the 4th December 1876.

†[Sec. 1 :—Any relative or friend of a minor who may desire to prefer any claim in respect of the custody or guardianship of such minor may make an application by petition, either in person or by a duly constituted agent, to the principal Civil Court of original jurisdiction in the district by which such application, if preferred in the form of a regular suit, would be cognizable, and shall set forth the grounds of his application in the petition. The Court, if satisfied by an examination of the petitioner, or his agent if he appear by agent, that there is ground for proceeding, shall give notice of the application to the person named in the petition as having the custody or being in the possession of the person of such minor, as well as to any other person to whom the Court may think it proper that such notice should be given, and shall fix as early a day as may be convenient for the hearing of the petition and the determination of the right to the custody or guardianship of such minor.] *

guardian of the minor, and remove the minor from the custody of persons who were arranging an improper marriage for her. The Judge rejected the petition, holding that he had no power to deal with the subject-matter of it, under Act IX of 1861, as that Act applied only to minors respecting whose custody or guardianship the Court had passed no order, whereas an order had been passed rejecting Ram Dyal's application in 1872, with respect to the guardianship of the minor in question. The Court considered that it was thus precluded, under the terms of s. 6, Act IX of 1861, from entertaining any fresh application whilst the order on Ram Dyal's application remained undisturbed.

[429] The petitioner appealed to the High Court.

Pandit Nand Lal for Appellant.

Babu Aprokash Chander Mukerji for Respondent.

Order. --We consider that this application can be entertained under the terms of s. 1, Act IX of 1861, and we reverse the Judge's order, and direct him to enquire into the application and pass an order according to law. The costs will abide the result.

[1 All. 429]

APPELLATE CIVIL.

The 18th May, 1877.

PRESENT :

MR. JUSTICE SPANKIE AND MR. JUSTICE OLDFIELD.

Ballabh Das.....Plaintiff

versus

Sunderdas and others.....Defendants.*

Hindu Law—Destruction of character of joint undivided family property by introduction of stranger in blood as auction-purchaser. Assent of coparceners no longer necessary to constitute valid gift.

The introduction of a stranger in blood as auction-purchaser of a portion of the rights and interest, of an undivided Hindu family breaks up the constitution of such family as undivided, and destroys the character of such property as joint and undivided family property; and a gift subsequently made by the remaining members of the original undivided Hindu family of their rights to a third person, without the assent of the auction-purchaser, is not invalid by reason of the principle of Hindu Law, which requires the assent of coparceners in an undivided Hindu family to give validity to such a gift.

THIS was a suit for partition and possession of half a garden with joint possession over half a well and for the maintenance of possession over eight biswas of *lakhraon* (land, i.e., planted with trees affording shade to roads). The whole of the above property belonged originally in equal shares to Brij Das and Brindaban Das (defendants Nos. 2 and 3) on the one side, and to Jumna Das and Har Gobind Das on the other, as their ancestral property. In April 1866, Sunder Das, defendant No 1, became the purchaser at an auction-sale of the

* Special Appeal, No. 1129 of 1876 from a decree of M. Brodhurst, Esq., Judge of Benares, dated the 21st June 1876, reversing a decree of Babu Pramoda Charn Banerji, Munsif of Benares, dated the 21st December 1878.

half share of Jumna Das and Har Gobind Das and obtained possession under the said sale of half the garden and well. In January 1874, Brij Das and Brindaban Das made a verbal gift of their share of the property to the [430] plaintiff who applied for a mutation of names in his favour; the Commissioner rejected this application, whereupon Sunder Das took possession of the whole garden, hence the suit. Among other defences set up by Sunder Das was this, *viz.*, that the gift was invalid, the property being ancestral and undivided. The Munsif gave the plaintiff a decree. On appeal by Sunder Das, defendant, the officiating Judge, relying on Elberling on Inheritance, para. 281, p. 132, and Maenaghten's Principles of Hindu Law, vol. 2, p. 224, ruled that a gift of any portion of joint ancestral property without prior division, and in the absence of the assent of all the co-sharers is invalid under Hindu Law, and on this ground he dismissed the suit. The plaintiff appealed to the High Court, and the principal ground of his appeal was that by the auction-sale of a portion of the property to a stranger the joint and undivided character of the property ceased, and that accordingly the principle of Hindu Law on which the Judge relied was inapplicable to the case.

The Senior Government Pleader (Lala Juala Prasad) for Appellant.

Pandits Bishambhar Nath and Nand Lal for Respondents.

The **Judgment** of the High Court after stating the facts proceeded as follows :—

We are of opinion that the Judge has not properly considered the effect of the auction-purchase of the respondent on the constitution of the joint family and the joint property; that purchase by introducing a stranger as owner of the rights and interests of two of the members of the original undivided Hindu family broke up the constitution of the family as an undivided Hindu family. The joint Hindu family is constituted by the union of descendants by heirship from some common ancestor, and there must be connection among its members by blood, relationship, adoption, and marriage. Property held in such coparcenership will be joint family property, the introduction of strangers in blood by auction-purchase necessarily breaks up the family relation.

Sir T. Strange, writing of the joint family, says "in the property *thus descended*, so long as they remain undivided, the family possesses a community of interest"; and the context shows that a descent of heirs is meant.

[431] We may refer also to a passage in West and Buhler, Part II, ii, and the rules under which partition which operates in respect of the undivided family takes place, show that an undivided family is constituted in the sense indicated.

The gift to the plaintiff is therefore not invalid on the ground held by the Judge. (The Court then went on to remand the case for the trial of the other issues raised by the defence.)

NOTES.

[The effect of an alienation on the status of the members has been considered in (1896) 21 Bom. 797; see also 2 All. 898.]

[1 All. 431]

APPELLATE CIVIL.

The 28th May, 1877.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR. JUSTICE OLDFIELD.

Girdhari and others.....Plaintiffs

versus

Sheoraj and others.....Defendants.*

Act VIII of 1859, ss. 5, 13—Account of sums realized on collective mortgage of lands in separate districts—Decree for redemption of lands within jurisdiction not barred by Regulation VII of 1825, because based on such account.

In a suit for redemption of lands lying within the district of Mirzapur, but included in the same mortgage with other lands lying within the domains of the Maharaja of Benares, the Subordinate Judge of Mirzapur took an account of the sums realized by the mortgagee from all the lands mortgaged, and finding that these sums were sufficient to discharge the entire mortgage-debt gave the plaintiff the decree sought; the lower Appellate Court dismissed the suit on the ground that such account could not be taken without deciding questions lying *ultra vires* of the Mirzapur Court. Held that the Mirzapur Court might take such account for the purpose of deciding whether the entire mortgage-debt had been satisfied, and might give the plaintiff a decree for the redemption of the property lying within the local limits of its jurisdiction, notwithstanding that in doing so it would have incidentally to determine questions relating to lands lying within the domains of the Maharaja.

THE facts of the case and the manner in which it was dealt with by the lower Courts are sufficiently stated in the judgment.

Munshi Hanuman Prasad and Pandit Ajudhia Nath for Appellant.

The Senior Government Pleader (Lala Juala Prasad) and Lala Lalla Prasad for Respondents.

Judgment.—The subject of the mortgage to which this suit refers is land situated in the district of Mirzapur, and land in par-[432]gana Bhadohi, in the family domains of the Maharaja of Benares, and Regulation VII of 1825 has provided a special jurisdiction for the trial of suits for land in these domains.

This suit was brought in the Court of the Subordinate Judge of Mirzapur by all the mortgagors, or rather the parties who now represent the original mortgagors, for redemption of the entire property mortgaged, and authority was asked, under s. 13[†] of Act VIII of 1859, to try the suit in the Civil Court of

* Special Appeal, No. 1342 of 1876, from a decree of J. W. Sherer, Esq., C.S.I., Judge of Mirzapur, dated the 24th August 1876, reversing a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Mirzapur, dated the 5th May 1876.

† [Sec. 13 :—If the Districts within the limits of which the property is situate, are subject to different Sudder Courts, the application shall be submitted to the Sudder Court to which the District in which the suit brought is subject; and the Sudder Court to which such application is made, may, with the concurrence of the Sudder Court to which the other District is subject, give authority to proceed with the same.]

Suits for immovable property situate in Districts subject to different Sudder Courts.

Mirzapur in respect of the property situated in the family domains, but this was refused, as the High Court found that such authority could not be given in the existing state of the law.

Two of the plaintiffs who were only interested in the mortgage to the extent of the property in the family domains then withdrew from the suit, and the others proceeded with their claim to redeem the portion of the mortgaged property situated in Mirzapur, and they have obtained a decree from the Subordinate Judge for possession of the mortgaged property in Mirzapur on the basis of the satisfaction of the entire debt charged on the two properties.

The Judge, in appeal, has reversed the decree and dismissed the suit, holding that the trial will raise questions affecting property in the family domains in respect of which he has no jurisdiction, instancing in this view, and in the way of objections, the question whether the mortgagees were in possession of certain lands in Katehri (in the domains), and without which the accounts cannot be made up.

We do not consider that this objection to the trial of the suit is valid.

The plaintiffs were at liberty to forego, as they have done, suing for possession of the property situated in the family domains, and the suit as now brought is only for immoveable property in the district of Mirzapur: the suit does not seek to recover and in the domains, nor is there any claim raised in this suit of a nature exclusively cognizable by Courts established under Regulation VII of 1825. Section 5 of Act VIII of 1859 gives the Mirzapur Court jurisdiction to entertain the suit in respect of the immoveable property in Mirzapur, and that jurisdiction could not be ousted be [433] cause, in the course of the trial of the suit, it may be necessary incidentally to decide, for the purposes of the suit, questions relating to mortgaged property held by the defendants in the family domains, the extent of it in their possession, and its profits, in order to make up the accounts of the entire mortgage so as to ascertain if the entire mortgage-debt has been satisfied, and if, therefore, the plaintiff has a right to recover the mortgaged property situated in Mirzapur.

We reverse the decree of the Lower Appellate Court and remand the case, under s. 351, Act VIII of 1859, for trial on the merits.

Decree reversed and cause remanded.

[1 All. 433]

APPELLATE CIVIL.

The 12th January, 1877.

PRESENT :

SIR ROBERT STUART, K.T., CHIEF JUSTICE, AND MR. JUSTICE SPANKIE.

Balwant Singh.....Defendant

versus

Gokaran Prasad.....Plaintiff.*

*Charge against immoveable property—Auction purchaser's rights
subject to Lease.*

An obligee under a bond giving him a charge upon land who sues for and obtains only a money-decree, under which he himself purchases the land, the sale-proceeds being sufficient

* Regular Appeal, No. 88 of 1876, from a decree of Rai Bhagwan Prasad, Subordinate Judge of Mainpuri, dated the 20th May 1875.

to discharge the debt, cannot fall back on the collateral security for a debt which no longer exists. *Sembler* that even if the sale-proceeds were not sufficient to discharge the debt, the obligee could not according to the principle laid down in *Khub Chand v. Kalian Das* (I. L. R., 1 All., 240) avail himself of his collateral security to avoid a lease granted by the obligor after the date of the bond.

THE plaintiff sued in 1873 to recover the amount due under a bond, dated the 26th June 1872, by which immoveable property was hypothecated to him, but did not seek to enforce his charge upon the land. In execution of the money-decree thus obtained, the plaintiff attached, brought to sale, and became the auction-purchaser of the said property. Between the date of the bond hypothecating the property and the institution of the suit thereon in 1873, the obligor gave a lease of a portion of the said property for a term of years to a third person. The lessee opposed the plaintiff's possession, and the plaintiff accordingly in 1875 brought the present suit against him and others.

[434] The Subordinate Judge gave the plaintiff a decree and the lessee appealed to the High Court on the grounds stated in the judgment below.

Pandit Ajudhu Nath and Munshi Hanuman Prasad for Appellant.

Pandits Bishambhar Nath and Nand Lal for Respondent.

The Judgment of the Court was delivered by

Spankie, J.—On the 26th June 1872, one Daulat executed a bond for Rs. 6,000 in favour of Gokaran Prasad payable by instalments extending over thirty years, and he hypothecated his five-biswa share in the village of Bajua as security for the payment of the debt, any transfer being prohibited until the money was repaid. In case of any default in the payment of the instalments, interest at the rate of one per cent. per mensem was payable. If two instalments remained unpaid, the obligee was entitled to recover the entire amount from the obligor and the property hypothecated. On the 12th May 1873, Paras Ram, Lambardar, and Lal Singh, Pattidar, sons of the obligor, Daulat, describing themselves as owners of two-thirds out of the five-biswa share hypothecated by the said Daulat, leased their two-thirds including *sir* lands and all other rights for a period of twelve years to Hukam Singh. This lease was registered on the 28th of August, and mutation of names was had in the Revenue Court. In the meantime default had occurred in the payment of instalment under the bond, and a suit was instituted by Gokaran Prasad on the 28th October 1873, for the money due on the bond against them, but he had not sought to enforce his lien against the property, as there was no decree against it. On the 28th August 1874, the same plaintiff as decree-holder purchased the property, and after taking a receipt for the money due to the decree-holder, the judgment-debtors received the balance of the sale-proceeds, some Rs. 3,000. The plaintiff then found that the lessee under the lease of May 1873, opposed his possession in respect of a little more than three biswas, six biswansis, thirteen kachwansis, and six manwansis. He therefore brought this suit, making the lessee and lessors defendants in the case. He sues, as auction-purchaser and to set aside the lease as having been executed collusively and fraudulently without his knowledge with **[435]** the view of depriving him of his right, in spite of the hypothecation made in the bond of 1872. By a subsequent petition, the plaintiff was allowed to amend his plaint by the additional prayer that his lien under the bond of June 1872 might be enforced.

The facts are not denied. The defendant, Hukam Singh, the lessee, contends that as the plaintiff did not sue for the enforcement of the lien when he sued for the money due on the bond, the lien had become null and void

after the passing of the money-decree, and plaintiff was not competent to sue for the cancellation of the lease which had been executed in good faith and for legal consideration. The defendant obtained possession prior to the purchase of plaintiff, with whose knowledge the lease was made and mutation of names effected under it, he being a co-partner and sharer in the estate. The suit had been instituted by collusion between plaintiff and the lessors.

The lessors do not appear to have defended the suit. The Subordinate Judge in a brief decision held that the plaintiff's omission to claim the enforcement of the lien was no bar to his present claim, and that the lease had been collusively executed by the lessors and lessee, that it was a transfer, and therefore an alienation prohibited by the conditions of the bond and must be set aside.

Substantially, the pleas in appeal on the part of the defendant are the same as those urged in the Court below.

The decree of the Subordinate Judge cannot, we think, be maintained.

It has been held by this Court [in *Khub Chand v. Kalan Das* (I.L.R., 1 All., 240)] that "nothing passes to the auction-purchaser at a sale in execution of a decree but the right, title, and interest of the judgment-debtor at the time of the sale." The case cited is not precisely similar to the one before us but the principle is the same. It was also ruled that when the holder of a simple mortgage-bond obtained only a money-decree on the bond, in execution of which the property hypothecated in the bond was brought to sale and was purchased by him, he could not resist a claim to foreclose a second mortgage of the property created prior to its attachment and sale in execution of his decree, and further, it was held that the holder of a money-decree in the particular case could not avail himself of a condition against alienation contained [436] in his bond to resist the foreclosure. Here, too, the principle would seem to apply. But in the case now before us, the auction-purchaser was the decree-holder, and the sale-proceeds were sufficient to discharge the debt and give a considerable surplus to the judgment-debtors. Under those circumstances, we fail to perceive how the auction-purchaser can fall back upon the collateral security for a debt which no longer exists. But, apart from this, if the lease of May 1873 was prohibited by the hypothecation and conditions of the bond, then plaintiff might have proceeded against the property so hypothecated when he first instituted his suit, and possibly might have impleaded the lessee successfully. He omitted to do so, and his debt having been satisfied, it seems that he has no title as auction-purchaser to question the lease. It was made before he had brought his suit and registered openly; mutation of names was had under it. It is not denied that the plaintiff is a co-partner and sharer in the estate. The lease is for twelve years only and for a portion only of the property hypothecated. There was no attachment of the property when the lease was made. It was for the plaintiff to have established that the lease was fraudulently prepared and executed with a view to injure him. This we do not find that he had been successful in proving. He has not lost the property. He is the proprietor of it. It has not been so alienated as to jeopardise his proprietary right. He has got under his auction-purchase all the rights that his judgment-debtor possessed, subject, however, to the lease which has placed the management of two-thirds of the five-biswa share in the hands of a lessee for twelve years. But, as pointed out above, he could not fail to have been aware of the transaction, and deliberately he omitted to sue to enforce his lien, if he could do so, against the lessee, when he brought his claim for the money due under the bond. He has no one to blame but

himself, and having satisfied his debt by the purchase of the property, it is too late now to say that the lease was an infringement of the hypothecation of the bond.

We decree the appeal, and reverse the decree of the Subordinate Judge, and dismiss the suit with costs.

Appeal allowed.

[437] APPELLATE CIVIL.

The 25th May, 1877.

PRESENT :

MR. JUSTICE TURNER AND MR. JUSTICE OLDFIELD.

Ambika Dat.....Plaintiff

versus

Sukhmani Kuar and another.....Defendants.^{*}

Hindu Law—Joint and undivided ancestral property—Definement of shares—Insufficient evidence of partition—Enjoyment of profits.

Definement of shares in joint ancestral property recorded as separate estate in the revenue records in pursuance of an alleged intended separation between the members of a joint and undivided Hindu family does not necessarily amount to such separation, which must be shown by the best evidence, *viz.*, separate enjoyment of profits, or an unmistakable intention to separate interests which was carried into effect.

THE plaintiff in 1874 sued the defendants, widows of the plaintiff's deceased cousin, Debi Prasad, for possession of certain landed property, ancestral and acquired with other estate, of which the defendants were in possession, the plaintiff alleging that his deceased cousin and himself were members of a joint and undivided Hindu family, and that the plaintiff as nephew of Debi Prasad was entitled to succeed to Debi Prasad's estate. The defendants pleaded in answer to the suit that they held possession of the bulk of the estate under a compromise entered into in 1872 between the plaintiff and the defendants after the death of Debi Prasad; and, with respect to the claim set up by the plaintiff to a half share of certain landed property in mauza Sandhi, the defendant asserted that it was held by them under a partition effected in 1854, when the plaintiff was a minor, between the plaintiff's father, Dhaneshar Ram, and Debi Prasad's father, Maneshar Ram.

The Subordinate Judge found that the compromise of 1872, asserted by the plaintiff to have been only a nominal proceeding, really took effect, and, so far as it related to all the property held thereunder, dismissed the suit, but with respect to the half share of mauza Sandhi, the Subordinate Judge gave the plaintiff a decree, holding that, notwithstanding the definement of shares in the property, which occurred in 1854 owing to a temporary rupture in the family, the enjoyment of the profits of the said property [438] remained joint.

* Regular Appeal, No. 19 of 1876, from a decree of Pandit Jagat Narain, Subordinate Judge of Jaunpur, dated the 18th December 1875.

The plaintiff appealed to the High Court with respect to the portion of the claim dismissed, and the respondents filed objections under s. 348 of Act VII of 1859 to the finding of the Subordinate Judge that the partition of 1854 was not completed by the mere definement of shares recorded as separate property in the revenue records. The portion of the High Court's decision relating to the said property as joint and undivided, notwithstanding the definement of shares, will be found below.

Munshi Hanuman Prasad, Pandit Bishambhar Nath and Choley Tiwari for Appellant.

Pandit Ajudhia Nath for Respondents.

Turner, J. (after stating the facts continued).—On the question of the character of the family whether in union or divided there is not much reliable evidence either way. It is for the defendants to make out a sufficient case showing partition, but with the exception of the facts that there was a quarrel between Maneshar Ram and Dhaneshar Ram in 1854, and that they then defined their interests in the property which they then held, and which at their deaths came to be recorded in the same way in their sons' names, there is really no reliable evidence. There is nothing definite to show the very important fact that the definement of shares was ever followed by separate enjoyment of profits.*

The fact that there was a definement of shares followed by entries of separate interests in the revenue records in some estate only is an important piece of evidence towards proving separation of title and interests, but it will not necessarily amount to such separation; it must be shown that there was an unmistakable intention on the part of the shareholders to separate their interests, and that the intention was carried into effect. The best evidence is separate enjoyment of profits and dealings with the property; and if we find through a long course of years nothing to show that the definement of shares which took place in 1854 has been acted on, and that the parties continued to enjoy the property on the [439] same footing as before, it is but reasonable to suppose that, although they may have taken some steps towards separation, from some cause or other—it may be a reconciliation—the intention to separate was abandoned.

It appears to be the fact that Dhaneshar Ram, who was devoted to religion, never managed his own affairs; the management was in the hands of Maneshar Ram, apparently both before and after 1854, and until Maneshar's death. Maneshar was succeeded in the management by Debi Prasad, who continued to be sole manager during and after the cessation of plaintiff's minority and until he died in 1872. Had what occurred in 1854 operated as a separation, we think it probable that something would have been done to relieve Maneshar of the management, and it would not have been continued in Debi Prasad while Dhaneshar was alive, nor is there any satisfactory evidence to show any separate enjoyment of profits or separate dealings with the property. There are no accounts which show it; such as there are point the other way, the oral evidence is indefinite and contradicted by oral evidence on the side of defendants, and the documents which show purchases, etc., in Debi Prasad's sole name cannot be relied on to show either separation or union of interest, for he was manager of the entire property and head of the family, and

* See *Appovier's case*, 11 Moore's Ind. Ap. 75 (89), and *Raja Suraneni Venkata Gopala Narasinha Roy Bahadur v. Raja Suraneni Lakshmi Venkama Roy* 3 B. L. R. (P.C.) 41.

the plaintiff was a minor, and transactions might have been done in his name in his capacity as a manager.

On the other hand we have the statement of Debi Prasad himself, made on the 5th July 1871, to the effect that there was no kind of separation, and the profits of the villages were without any specification considered by him to be the common property of himself and Ambika Dat. We do not see any reason why this statement should be distrusted because it was given for the purpose of the income-tax assessment. We consider the last plea in appeal as to costs is so far valid, that each party should pay their own costs, and with this modification we shall affirm the judgment of the Lower Court and dismiss the appeal, each party paying their own costs.

Appeal dismissed.

[440] APPELLATE CIVIL.

The 5th June, 1877.

PRESENT :

MR. JUSTICE PEARSON AND MR. JUSTICE TURNER.

Lachman Rai and others..... Defendants

versus

Akbar Khan and others..... Plaintiffs.*

Manorial dues and cesses—Feudal system—Immemorial custom--What is best proof thereof—Custom must be definite to be good—Parol and documentary evidence.

The plaintiffs, zannindars, sued for a declaration of their ancient right as against all the tenants of a certain village to appropriate all trees of spontaneous growth and the fruits of other trees planted by the tenants: also to receive as manorial tribute a certain number of ploughs annually and a certain offering of poppy-seed and other farm-produce on the occasion of the marriage of persons of the lower caste of tenants, with a further right to levy a certain proportion of the produce of the sugarcane manufactories and fields in the village. The Lower Courts having decreed the suit on vague and general parol evidence as to the existence of the said customs, *held* (a) that where a custom regarding several cesses is alleged, the existence of the custom regarding each cess should be tried as a separate issue; (b) that parol evidence as to the existence of such customs should be tested by ascertaining the grounds of the witnesses' opinion; (c) that the best proof of custom is instances in which it has been

* Special Appeal, No. 188 of 1877, from a decree of R. F. Saunders, Esq., Judge of Azamgarh, dated the 21st November 1876, affirming a decree of Maulvi Muhammad Hasan Khan, Munsif of Azamgarh, dated the 16th August 1876.

acted on and documentary evidence that it has been enforced ; (d) that a custom to be good must be definite.

THE plaintiffs, as zamindars, sued all the tenants of mauza Harirampur for a declaration of their manorial rights as against all the tenants collectively to the appropriation by the plaintiffs of all trees of spontaneous growth, the fruit of mango, mahua and other trees planted by the defendants, and of their right to receive a tribute of two ploughs annually, as also an offering of a certain quantity of poppy-seed, hemp, bhusa, cow-dung cakes, and other farm-produce, on the occasion of the marriage of the lower caste tenants, with a further right to levy as dues from the said tenants a proportionate quantity of sugarcane juice prepared by each sugar manufactory, and the presentation of a certain number of sticks of sugarcane on a certain day in each year to the plaintiffs. The cause of action alleged was an order of the settlement officer in the recent settlement amending the wajib-ul-arz or record-of-rights, on the objections preferred by the tenants challenging the existence of the rights, which had [441] been inserted in the said record. The defendants contested the suit on grounds of limitation and long disuse of such customary dues, if they ever existed, which they also denied. The Munsif, upon parol evidence of the former existence of the alleged village customs, although no record of rights to such cesses was to be found in any settlement records after 1857, decreed the plaintiff's claim.

The defendants in appeal before the Judge urged that a single suit against various classes of tenants and comprising the various claims set forth in the plaint could not be maintained, and that there being no documentary evidence adduced by the plaintiffs in support of the alleged dues, the parol evidence offered by the plaintiffs was not reliable. The Judge dismissed the appeal, holding that the claims were of the same character, and that the existence of the customs as immemorial was proved by sufficiently reliable parol evidence in the absence of revenue records destroyed during the Mutiny.

Babu Beni Prasad, for Appellants.

Mr. Colvin and Shah Asad Ali, for Respondents.

The Order of the High Court remanding the case for a proper trial was delivered by

Turner, J.—It is to be regretted that the Courts below have not inquired more fully before affirming the existence of customs of which some, although no doubt they at one time obtained in certain parts of the country, apportioned to the feudal system and are disappearing with that system.

In such cases it is peculiarly incumbent on the Courts to try the existence of the custom regarding each cess as a separate issue, and to test the parol evidence given generally as to the existence of the custom by ascertaining on what grounds the opinion of each witness is based. The most cogent evidence of custom is not that which is afforded by the expression of opinion as to the existence, but by the enumeration of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records or private accounts and receipts that the custom has been enforced.

[442] It should also have been specifically determined on what castes or classes of tenants custom imposes a cess claimed if the existence of the custom is proved. Again, a custom to be good must be definite, the size of the pot of sugar and the basket of cow-dung is left uncertain, as are also the times of rendering these alleged dues.

That the claims may be more thoroughly tried, we set aside the decrees of both Courts, and direct the Court of First Instance after framing specific issues to re-try the suit. The costs incurred hitherto will abide and follow the result.

Decree reversed and cause remanded.

[1 ALL. 442]

APPELLATE CIVIL.

The 7th June, 1877.

PRESENT :

MR. JUSTICE PEARSON, AND MR. JUSTICE TURNER.

Dalip Singh.....Plaintiff

versus

Durga Prasad.....Defendant.²

Act I of 1872 (Evidence Act), s. 91 (e)—Act VIII of 1871 (Registration Act), ss. 17, 49—Receipt for sums paid in part of mortgage-debt—Inadmissibility of unregistered receipt—Parol evidence admissible.

A receipt for sums paid in part liquidation of a bond hypothecating immoveable property must be registered under the provisions of s. 17 of Act VIII of 1871 to render it admissible as evidence under s. 49¹ of the said Act. Under illustration (e), s. 91¹ of Act I of 1872, such

* Special Appeal, No. 231 of 1877, from a decree of Maulvi Wajih-ul-la Khan, Subordinate Judge of Moradabad, dated the 18th May 1877, modifying a decree of Rai Kanhy Lal, Munsif of the Environs of Moradabad, dated the 14th December 1875.

† [Sec. 49 :—No document required by section seventeen to be registered, shall affect any immoveable property comprised therein, or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered in accordance with the provisions of this Act.]

‡ [Sec. 91 :—When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.]

Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.—Wills under the Indian Succession Act may be proved by the Probate.

EXPLANATION 1.—This section applies equally to cases in which the contracts, grants or disposition of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

EXPLANATION 2.—Where there are more originals than one, one original only need be proved.

EXPLANATION 3.—The statement in any document whatever of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.] *

payments may, nevertheless, be proved by parol evidence, which is not excluded owing to the inadmissibility of the documentary evidence.

THE plaintiff sued the defendant to recover a sum of money alleged to be due on a bond hypothecating immovable property by sale of the said property. The defendant produced a receipt for a portion of the amount alleged to have been signed by the plaintiff, and claimed credit to that extent. The plaintiff denied the genuineness of the receipt, and pleaded that under ss. 17 and 49 of Act VIII of 1871 the receipt being unregistered was inadmissible as evidence.

[443] The Munsif found that the receipt was genuine, and held that registration of it was not compulsory; the Munsif therefore allowed the set-off claimed by the defendant, and decreed the plaintiff's suit for the balance.

On appeal by the plaintiff against the portion of the claim disallowed by the Munsif, the Subordinate Judge ruled that, under s. 17 of Act VIII of 1871, registration of the receipt was compulsory, and under s. 49 of the said Act, that the receipt being unregistered was inadmissible as evidence. The Subordinate Judge further ruled that the parol evidence of payment of the money to plaintiff adduced by defendant was also inadmissible under the circumstances, and the Subordinate Judge, reversing the Munsif's decision, decreed the suit in full.

In special appeal before the High Court the defendant contended that registration of the receipt was not necessary under the Registration Act, and that even if the receipt were inadmissible as evidence of payment without being registered, the fact of payment could nevertheless be proved by parol evidence.

Munshis *Hanuman Prasad* and *Sukh Ram* for Appellant.

Mr. *Conlan* and Pandit *Bishambhar Nath* for Respondent.

The Order of the Court remanding the case for decision on the parol evidence was delivered by

Pearson, J.—We are compelled to concur in the ruling of the lower Appellate Court that the receipt for Rs. 477 should have been registered, and not having been registered, is inadmissible as evidence of the payment. But the lower Appellate Court's further ruling that the oral evidence of the payment adduced by the defendant is inadmissible is opposed to illustration (e), s. 91 of the Indian Evidence Act. We therefore direct the lower Appellate Court, under s. 351 of Act VIII of 1850, to find upon the oral evidence whether the alleged payment is proved to have been made, and to submit its finding when the parties may take objections within a week.

The Subordinate Judge having returned a finding against the defendant on the parol evidence, the Court passed the following final

[444] Judgment:—No objection being taken to the finding of the lower Appellate Court on the point referred to it, we accept that finding and dismiss the appeal with costs.

Appeal dismissed.

[1 ALL. 445]
FULL BENCH.

The 14th June, 1877.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, AND MR. JUSTICE SPANKIE.

Nanku and another.....Defendants

versus

The Board of Revenue for the N.-W. P., in the capacity of the Court of
Wards, for the Minor Raja of Kantit.....Plaintiff.*

*Suits cognizable by Courts of Small Causes—Act XXII of 1861, s. 27—
Zamindari dues and cesses not coming within the classes of such
suits—Joinder of causes of action between same parties.*

The plaintiff claimed from the defendants, as joint decree-holders, a fourth share of the proceeds realised by auction-sale through the Court of the Munsif of certain houses, situate on land subject to a village-custom whereby a proprietary due of the above amount was recognized and payable to the zamindar of the said land. The Division Bench of the High Court having referred to the Full Bench the question whether claims for such zamindari dues or cesses were in the nature of suits cognizable by a Court of Small Causes, held by the Full Bench that the claim as brought does not fall within any of the classes of suits cognizable by the Courts of Small Causes; *aliter* if the due is payable in virtue of a contract.

Held by the Division Bench that the claim is not bad for misjoinder, as the due was payable out of the sale-proceeds taken out of Court by the decree-holders.

THE Board of Revenue, North-Western Provinces, representing the Court of Wards as Manager of the estate of the Raja of Kantit (a minor), sued in 1875 to recover from the defendants a sum of Rs. 115-8-0, a fourth share of the sale-proceeds of certain houses belonging to one Jokhu Misr situate on the estate of the said Raja of Kantit, which the defendants, as decree-holders against the said Jokhu Misr, had attached and sold by auction in 1873, through the Court of the Munsif of Mirzapur, and of which the defendants had realised the sale-proceeds. The suit was based on an alleged village custom obtaining in the Kantit estate by which the Raja [445] as zamindar was entitled to receive as "huq-i-chaharum" one-fourth share of the sale proceeds of property situate on the said estate as a proprietary due. The defendants pleaded among other matters that as auction-purchasers under their joint money-decree of distinct houses sold at different times the suit was bad for misjoinder.

The Munsif found that the suit was not bad for misjoinder as against the defendants because they were sued as joint decree-holders who had realised the sale-proceeds of the property, and not as auction-purchasers thereof. The defendants in appeal before the Judge of Mirzapur repeated the pleas contained in their reply to the suit, and the Judge finding the pleas untenable affirmed the decision of the Munsif and dismissed the appeal with costs.

In special appeal to the High Court a question having been raised as to whether suits for "huq-i-chaharum" or other zamindari cesses were in the

* Special Appeal, No. 1452 of 1876, from a decree of J. W. Sherer, Esq., C. S. I., Judge of Mirzapur, dated the 16th September 1876, affirming a decree of Munshi Madho Lal, Munsif of Mirzapur, dated the 15th May 1876.

nature of suits cognizable by a Court of Small Causes, the Court (PEARSON and TURNER, J.J.) made the following order :—

It appearing that there are conflicting rulings, we refer to the Full Bench the following question :—

Are suits for "huq-i-chaharum" or other zamindari cesses of the nature cognizable by a Court of Small Causes.

Munshi *Sukh Ram* and Maulvi *Mehdi Hasan* for Appellant.

The Senior Government Pleader (*Lala Juala Prasad*), for Respondent.

STUART, C.J., PEARSON, TURNER, and SPANKIE, J.J., *concurring* :—We have considered the language of the Small Cause Court Act, and hold that the claim brought in this suit does not fall within any of the classes of suits made cognizable by those Courts. The claim is for a zamindari due customarily payable, it is not a claim for money due on contract, nor for personal property or the value thereof, nor for damages. The opinion at which we have arrived is in accordance with the more numerous rulings of this Court, and with the practice of the Court to allow special appeals in such cases although the sum in dispute is of less amount than Rs. 500. It must not be understood that we impugn the [446] ruling that, where "chaharum" is payable in virtue of a contract, the claim is of a nature triable by a Court of Small Causes.

The Division Bench, upon the return of the case with the above finding, dismissed the appeal on the grounds detailed in the judgment of the Court delivered by—

Turner, J.—The Full Bench being of opinion that a claim for "huq-i-chaharum" is not cognizable by a Court of Small Causes we may entertain the appeal.

The first plea alone is urged that the claim is bad for misjoinder. This plea has for sufficient reasons been overruled by the Courts below. The sale-moneys, although the produce of the sale of more than one lot, have been taken out of Court by the decree-holders, the appellants, and they must give up to the respondent, the zamindar, his due in respect of each sale. The causes of action though several are between the same parties. The appeal fails and is dismissed with costs.

Appeal dismissed.

[1 All. 446]

APPELLATE CIVIL.

The 21st June, 1877.

PRESENT :

MR. JUSTICE PEARSON, AND MR. JUSTICE TURNER.

Ganpat Rai and another.....Defendants

versus

Sarupi.....Plaintiff.*

Money-decree passed on mortgage-bonds—Mortgage-rights not conveyed by sale of money-decree.

The purchaser of a simple money-decree passed on a bond hypothecating property does not merely by his purchase acquire a lien upon the property.

* Regular Appeal, No. 21 of 1877, from a decree of Rai Shankur Das, Subordinate Judge of Saharanpur, dated the 4th December 1876.

ONE Badri Das, the mortgagee of certain lands and houses, obtained in 1868 a money-decree on his mortgage bonds. The plaintiff's husband, one Narayan Das, together with one Jamna Das, purchased in 1871 the said decree. The said Narayan Das having died, the plaintiff brought this suit as his widow and guardian of his minor sons, alleging that the said Narayan Das by the purchase of the said money-decree acquired with his co-vendee the mortgage-rights of Badri against the said property, and seeking to [447] enforce a moiety of these rights by sale of the said property. The defendants were the original mortgagors and certain auction-purchasers of the said property under sales effected in execution of money-decrees obtained by other persons against the said mortgagors. The co-vendee having declined to join in the suit, was made a *pro forma* defendant.

The defendants set up a number of pleas in the Subordinate Judge's Court, but the Subordinate Judge overruled them and gave a decree to the plaintiff.

The defendants in appeal to the High Court, in addition to the pleas urged in the Court of First Instance, relied on the further ground that under the deed of sale conveying the rights conferred by the money-decree of 21st December 1868, no hypothecation rights against the property passed to the purchasers of the said decree.

Pandit Bishambhar Nath and the Junior Government Pleader (Babu Dwarka Nath Banarji) for Appellants.

Munshi Hanuman Prasad and Babu Barodka Prasad, for Respondent.

The Judgment of the Court was delivered by

Turner, J.—The sale in this case extended not to the original debt but to the decree, and in the sale-deed no reference is made to any securities held by the original creditor. In our judgment then the sale-deed conveyed to the purchaser no title to the securities.

We do not say that if the debt itself had been sold, the purchaser might not have been entitled to call upon the seller to assign the securities. That question when it arises will be determined in reference to the terms of the contract, but in the case before us it is clear all that was sold was the money-decree.

Instances may be suggested in which the holder of such a decree would be unwilling to part with the lien though willing to sell the decree. He may, for instance, have a second mortgage of the same property, and it would, in our judgment, lead to injustice to hold that the sale of the decree carried with it necessarily the right to an assignment of all securities held by the original creditor.

[448] Whether this be so or not the lien in the present instance has not been assigned to the plaintiffs, and, therefore, they cannot claim the benefit of it. The decree of the Court below must be reversed and the suit dismissed with costs.

Appeal allowed.

[1 All. 448]
APPELLATE CIVIL.

The 29th June, 1877.

PRESENT:

MR. JUSTICE TURNER, AND MR. JUSTICE SPANKIE.

Bakhat Ram and another.....Plaintiffs
versus
Wazir Ali and others.....Defendants.*

Act XVIII of 1873 (North-Western Provinces Rent Act), ss. 7, 95—Sir land—Exproprietary tenant—Mortgage of proprietary rights in a mahal followed by sale—Ejectment—Mesne profits—Trespasser—Jurisdiction—Civil Court—Revenue Court.

A suit to eject a person from land as a trespasser, a person who has entered upon such land asserting his claim to the status of an exproprietary tenant, and to recover from him mesne profits, is a suit cognizable by the Civil Court. †

The possession of sir land by conditional mortgagees must be treated as the possession of the mortgagors; held accordingly that where the mortgagees of certain proprietary rights in a mahal, being in possession of such rights, purchased the same at an auction sale, the sir land included in the proprietary rights was held by the mortgagors at the time of the auction-sale, within the meaning of s. 7 of Act XVIII of 1873, and that after the sale, in virtue of the provisions of that section, they became entitled to a right of occupancy in the sir land.

Inasmuch as the mortgagors had a right of occupancy in the sir land, they could not be treated as trespassers for ejecting the mortgagees' tenant and taking possession; but inasmuch as instead of giving notice to the mortgagees of their intention to avail themselves of such right and to enter on the sir land as tenants, at the same time offering to pay such rent as might, having regard to the provisions of s. 7, be properly payable by them, they entered on the sir land and ousted the mortgagees' tenant, they rendered themselves liable for mesne profits.

THIS was a suit to eject the defendants as trespassers from certain sir land and to recover mesne profits. The plaintiffs held [449] possession of the share which included the sir land as conditional mortgagees. The sir land was sublet by them to a tenant. The rights in the share remaining in the mortgagors, who were the defendants in this suit, were sold at auction and purchased by the plaintiffs, who thus became possessed of the share and the sir land in full proprietary right. The defendants, the plaintiffs alleged, had ousted the plaintiffs' tenant from the sir land. The defendants set up as a defence to the suit that, having lost their proprietary rights, they were entitled, in virtue of s. 7 of Act XVIII of 1873, to a right of occupancy in the sir land. The Court of First Instance, holding that, as at the time of the auction-sale the plaintiffs were already in possession as mortgagees, they did not lose their right to possession by purchasing the rights remaining in the mortgagors, gave the plaintiffs the decree which they sought, without determining what was the amount of mesne profits they were entitled to recover, although an issue had been fixed as to this point. On appeal by the defendants, the lower Appellate Court held that the plaintiffs' rights as mortgagees merged in the higher title

* Special Appeal, No. 399 of 1876, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Ghazipur, dated the 11th January 1876, reversing a decree of Maulvi Ezid Baksh, Munsif of Muhammadabad, dated the 20th August 1875.

† See also *Ghisa v. Didari*, H. C. R., N.-W. P., 1875, p. 257; *Rughobar Misser v. Sital*, (p. 228); and *Mata Para Parshad v. Janki*, p. 226.

acquired by the auction-sale, and remanded the suit to the Court of First Instance, under s. 351 of Act VIII of 1859, in order that it might take evidence as to the produce of the land, and then determine whether or not the suit was cognizable by the Civil Court.

The plaintiffs appealed to the High Court, taking exception to the lower Appellate Court's procedure, and contending that the suit was cognizable by the Civil Court, that if the defendants had any right in the land, they could enforce it according to law, but could not eject the plaintiffs' tenant, that the only questions in the suit were whether the plaintiffs' tenant had been dispossessed, and what damages the plaintiffs were entitled to; and that, when the defendants adduced no evidence as to the damages, although an issue was framed on that point, they could not fairly complain of the decree of the High Court of First Instance in that respect.

Lala Lalla Prasad, for the Appellants.

The Senior Government Pleader (Lala Juala Prasad) and Shah Isad Ali, for the Respondents.

[450] The suit was remanded to the lower Appellate Court, under s. 354 of Act VIII of 1859, the Court (after stating the facts of the case and the manner in which it was dealt with by the lower Courts) making the following

Order of Remand.--It was the duty of the lower Appellate Court to determine for itself whether or not the suit was cognizable by the Civil Court, and if it held the suit to be cognizable to proceed to determine it, remitting an issue under s. 354 touching damages, or if it found the suit was not cognizable to dismiss it forthwith. That the suit as brought was cognizable by a Civil Court, we see no reason to doubt. The plaintiffs contend that the defendants ousted their tenant and took possession as trespassers. Such a suit may be instituted in the Civil Court.

The question then arises whether the defendants are to be regarded as trespassers or not.

In our judgment the Munsif was in error in holding that the plaintiffs, after the auction-sale, retained their position of conditional mortgagees. The lower Appellate Court properly held that, having acquired the rights of the mortgagors, they thenceforward retained possession in full proprietary right; and inasmuch as up to the time of the auction-sale their possession of the *sir* as mortgagees must be treated as the possession of mortgagors, it appears to us the defendants are entitled to contend that the *sir* was held by them at the time of the sale, and that after the sale, in virtue of the provisions of s. 7 of the Rent Act, they became entitled to a right of occupancy in the *sir* as tenants at favourable rates; and if, in the assertion of this right at the proper season of the agricultural year, they took possession, offering to pay the proper rent due from them, the plaintiffs have no right to treat them as trespassers, but can only claim rent in the proper Court.

In order to enable us to determine the suit and to avoid the necessity for any further remand or remission of issues, we order the lower Appellate Court to try the following issues:--(1) Under what circumstances did the defendants take possession of the land in suit, and did they or did they not inform the plaintiffs of their intention to take possession of it as tenants, and of their readiness to pay [451] rent. (2) If at the time the land was in the possession of the tenant, had the tenancy for the year in which the tenant was ousted commenced prior or subsequently to the auction-sale. (3) At what rent did the tenant hold the land in suit, and what proportion, if any, of that rent had he paid for the year in which he was ousted.

On the first issue the lower Appellate Court found that the defendants had ousted the plaintiffs' tenant, and that they did not inform the plaintiff's of their intention to take possession of the *sir* land as tenants, and of their readiness to pay rent. On the second issue it found that the tenancy for the year in which the tenant was ousted commenced subsequently to the auction-sale. On the third issue it found that the tenant paid an annual rent of Rs. 7-2-0 and that he had paid no portion of that rent for the year in which he was ousted. The lower Appellate Court having returned its findings, the High Court delivered the following

Judgment:—When the plaintiffs obtained the rights of the conditional vendors, their rights as conditional vendees merged, and they became possessed of the entire proprietary interest in the estate. Thereupon, by virtue of a provision of the rent law recently introduced, the defendants became entitled to hold their *sir* as tenants with rights of occupancy. Their proper course was to have given notice to the purchasers of their intention to avail themselves of their rights and to enter on the land as tenants, at the same time offering to pay such rent as might, having regard to the provisions of the Rent Act, be properly payable by them. It would then have been incumbent on them, or on the purchasers, if they were unable to agree to the amount of rent payable, to apply to the Revenue Court to determine the rent. The defendants, without communicating with the plaintiffs or taking any steps to have a rent assessed on the land, entered and ousted the tenant. They cannot, nevertheless, be deemed trespassers, for they have a right to the occupancy of the land, but the plaintiffs are entitled to recover damages for the use and occupation of the land, and we assess those damages at twenty-five per cent. less than the sum payable by the tenant.

The decree of the lower Appellate Court, so far as it reversed the claim for ejectment, is affirmed, so far as it dismissed the claim for [452] damages it is in part affirmed and in part reversed, and the plaintiffs will obtain a decree for the sum above-mentioned. Under the circumstances, we order each party to bear their own costs in all Courts.

[1 ALL. 452]
APPELLATE CIVIL.

The 12th July, 1877.

PRESENT :

MR. JUSTICE PEARSON, AND MR. JUSTICE TURNER.

Phulman Rai.....Defendant

versus

Dani Kuari.....Plaintiff.*

Pre-emption—Hindu widow—Wajib-ul-arz.

A Hindu widow holding by inheritance her deceased husband's share in a village fully represents his estate as regards such share, and is entitled to prefer a claim to pre-emption as a share-holder in such village.

THIS was a suit to establish the plaintiff's right of pre-emption to a share in a certain village, under a condition in the village administration-paper by

* Special Appeal, No. 266 of 1877 from a decree of Maulvi Sultan Hasan, Subordinate Judge of Gorakhpur, dated the 16th December 1876, reversing a decree of Maulvi Hafiz Rahim, Munsif of Bansgaon, dated the 27th October 1876.

which, on the sale of a share, share-holders were entitled to purchase in preference to strangers. The plaintiff was the widow of a deceased share-holder. Phulman Rai, a defendant in the suit, who also claimed the right of pre-emption, set up as a defence to the suit that the plaintiff was not a share-holder, being in possession of her deceased husband's share by way of maintenance, and not by inheritance, and that she could not maintain the suit. The Court of First Instance dismissed the suit on the ground that the sale impugned by the plaintiff was only made on her refusing to purchase. The lower Appellate Court gave her a conditional decree, being of opinion that she did not refuse to purchase. It did not enter into the question raised by the defence of Phulman Rai.

Phulman Rai appealed to the High Court, raising the same defence to the suit as he had raised in the Courts below. The High Court (PEARSON and TURNER, JJ.) remanded the suit to the lower Appellate Court to determine whether the plaintiff was a sharer in the estate or only entitled to maintenance. The lower Appellate Court did not distinctly determine this issue, but found that the share in the plaintiff's possession was joint and undivided ancestral property. To this finding, the plaintiff took exception on the evidence.

[453] The Senior Government Pleader Lala Juala Prasad and Pandit Ajudhia Nath, for the Appellant.

Munshi Hanuman Prasad, for the Respondent.

The following Judgment was delivered by the High Court :—

Turner, J.—(After finding on the evidence that the property was the separate property of the plaintiff's husband to which she succeeded by inheritance).—We must admit the objection taken to the finding on the issue remitted, and it remains for us to determine whether a widow, holding her husband's share by inheritance, is entitled to pre-emption. In our judgment so long as she enjoys the estate she fully represents the estate and can claim to exercise all rights which would attach to it in the hands of a male owner. The circumstance that the widow lived with the vendors would not deprive her of her right, it being found that the claim is not collusive.

Appeal dismissed.

[1 All. 453]

APPELLATE CIVIL.

The 16th July, 1877.

PRESENT :

MR. JUSTICE PEARSON, AND MR. JUSTICE TURNER.

Dular Chand.....Plaintiff

versus

Balram Dass and others.....Defendants.²

Non-joinder of parties—Rejection of plaint.

A suit was instituted by one only of the partners of a firm in respect of a cause of action which had accrued to all jointly. Notwithstanding that objection to the non-joinder of the other partners was duly taken, the plaintiff contented himself with putting in a petition on behalf of the other partners intimating their willingness that the suit should proceed in the sole name of the plaintiff, instead of applying to the Court to add the other partners as Plaintiffs. In appeal the High Court admitted the objection, and refused, under the circumstances, to add the other partners as plaintiffs.

* Regular Appeal, No. 110 of 1876, from a decree of J. W. Sherer, Esq., C.S.I., Judge of Mirzapur, dated the 7th November 1876.

As to the nature of this suit it is sufficient, for the purposes of this report, to state that the suit was brought on the 30th March 1876, by one of the five partners composing a firm in his own name, on a cause of action which he had in common with the other partners of the firm. In the written statement filed by one of the defendants on the 15th May 1876, objection was taken to the non-joinder of the other partners. On the 7th June 1876, on [484] behalf of the other partners, the plaintiff presented a petition to the Court of First Instance in which it was stated as follows :— As Dular Chand (the plaintiff) has always been the head of the family suits have always been instituted in the name of Dular Chand, and he manages the firm. We obey him as our superior, and have no objection to the suit which has been instituted on his part against the defendants; it may be decided solely with reference to him." The Court directed the petition to be filed with the record. An issue was fixed as to whether the plaintiff could sue alone. This issue the Court, observing that "it is clear that the partners are entirely at one in their interest and proceedings, that the suit has been laid with the knowledge of all, and that Dular Chand takes a leading part in business," decided in favour of the plaintiff. On the other issues in the suit it decided against him and dismissed the suit.

In appeal to the High Court by the plaintiff, application was made on his behalf for leave to amend the plaint by adding the other partners of the firm as plaintiffs.

Munshi Hanuman Prasad and Pandit Ajodhia Nath, for the Appellant.

Messrs. Colvin and Howard, for the Respondents.

The Judgment of the Court, so far as it related to this application, was as follows :—

The appellant was badly advised by his pleaders in the Court below to file his plaint in his sole name and not also in the name of the other partners in the firm, for he had no sole cause of action against the respondents. When the objection was taken by the respondents in the Court below, the Court should either have made the other partners parties, or, on this ground, have dismissed the suit. Even when the defect was pointed out, the appellant, instead of praying the Court to amend the plaint, put in a petition on behalf of the other partners intimating their willingness that the suit should proceed in the sole name of the appellant. The Judge was in error in holding that a defect of which the respondents complained and which, if it affected any party to the suit, affected them could be thus cured.

[485] The appellant's pleaders in this Court at once recognised the position in which their client was placed, and have preferred a petition praying that the other partners may now be made parties. Although in some instances parties have been added by this Court in the stage of appeal, yet, seeing that the appellant elected to go to trial and the case was decided in the Court below without amendment of the proceedings, we are of opinion that in this instance we ought to refuse the application and allow the objection.

We shall therefore dismiss the appeal, affirming the decree of the Court below, not on the grounds on which that decree was passed, but on the preliminary ground that all the necessary parties were not joined as plaintiffs, and that the appellant has shown no sole cause of action. The appellant and his partners may of course bring a fresh suit.

Appeal dismissed.

NOTES.

[See also 7 Bom. 217 ; 9 Bom. 311 : 14 All. 524 ; 18 Mad. 33.]

[1 All. 456]
APPELLATE CIVIL.

The 20th July, 1877.

PRESENT:

MR. JUSTICE TURNER, AND MR. JUSTICE SPANKIE.

Hira Chand.....Defendant
versus
Abdal.....Plaintiff.*

Redemption of mortgage—Suit for contribution—Misjoinder.

The purchaser of a share in a mortgaged estate, who has paid off the whole mortgage-debt, in order to save the estate from foreclosure, can claim from each of the other mortgagors a contribution proportionate to his interest in the property, but he cannot claim from the other mortgagors collectively the whole amount paid by him.†

THE plaintiff in this suit purchased at auction-sale the rights and interests in a certain village of one Rameshar Chand. He subsequently discovered that those rights and interests had been mortgaged jointly with those of Hira Chand and another person. To save a foreclosure of the mortgage the plaintiff was compelled to discharge the mortgage-debt. He sued to recover the amount [456] of this debt from the mortgagors. The Court of First Instance gave him a decree against all the defendants for the sum claimed, which decree was affirmed by the lower Appellate Court on appeal by Hira Chand.

Hira Chand then appealed to the High Court, contending that the suit as brought was unmaintainable.

Lala Lalta Prasad, for the Appellant.

Babu Jogindro Nath Chaudhri and Shah Asad Ali, for the Respondent.

The Judgment of the High Court was delivered by

Turner, J.—The suit cannot be maintained as brought. The plaintiff, respondent, the purchaser of a mortgagor's share, paid off the mortgage to save the property from foreclosure. He thereby became entitled to call upon each of the other mortgagors to contribute, that is to say, he could claim from each a contribution proportionate to his interest in the property. He has now claimed in the lump sum the whole amount paid by him from the other co-sharers collectively, not even excluding his own quota.

The appeal is decreed, and as the ground is common to all the defendants, and it would be inequitable to allow the decree to stand against any of them, we reverse the decrees of the Courts below as against the defendants who did not appeal as well as against the defendant who has appealed. Hira Chand will recover his costs in all Courts. The other defendants must pay their own costs.

Appeal allowed.

NOTES.

[See 12 All. 110.]

* Special Appeal, No. 618 of 1877, from a decree of Maulvi Sultan Hasan, Subordinate Judge of Gorakhpur, dated the 6th March 1877, affirming a decree of Maulvi Haftz Rahim, Munsif of Bansgaon, dated the 22nd December 1876.

† In *Rajaput Rai v. Ali Khan*, H. C. R., N.-W. P., 1873, p. 215, where a person, who had been compelled to satisfy a decree obtained against him and other persons jointly, sued such other persons for contribution, seeking a joint decree against them for the money he had paid after deducting his own share, the High Court, instead of dismissing his suit, remanded the case that the Court below might determine and separately decree the respective shares of the other persons.

[1 ALL. 456]

FULL BENCH.

The 23rd July, 1877.

PRESENT:

SIR ROBERT STUART, Kt., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, MR. JUSTICE SPANKIE AND
MR. JUSTICE OLDFIELD.

Udai Singh.....Judgment-debtor

versus

Bharat Singh and others.....Decree-holders.²

*Rival decrees-- Decree of Her Majesty in Council--Decree of the High Court
—Execution of decree.*

On appeal by *U*, the High Court set aside a decree which the sons of *K* had obtained in the Court of First Instance, against *U* and certain other persons [457] in a suit brought by them for possession of one-third of certain real property. At the same time on appeal by two of the other persons aforesaid, it affirmed a decree which *U* had obtained against these persons and the sons of *K* for possession of two-thirds of the same property, in a suit in which he had claimed possession of the whole. It subsequently, on appeal by *U* against that portion of the decree made in the suit brought by him which dismissed his claim in respect to one-third of the property, reversed that portion and gave him a decree for the whole. The sons of *K* appealed to Her Majesty in Council only from the decree of the High Court setting aside the decree obtained by them in the Court of First Instance for one-third of the property. Her Majesty in Council set aside this decree of the High Court and restored the decree of the Court of First Instance. In the meantime *U* was put into possession of the whole property in execution of the decree of the High Court which he had obtained in the suit brought by him. When the sons of *K*, in execution of the decree of Her Majesty in Council, applied for possession of one-third of the property, *U* opposed the application on the ground that he was in possession under a decree of the High Court which had become final.

Held, by a Full Bench of the High Court, that a decree of Her Majesty in Council must be executed, notwithstanding that its execution involved the disturbance of the possession obtained by *U* under the decree of the High Court which had become final.

ONE Pem Singh died possessed of certain real property situated in the District of Bulandshahr. On his death his widow succeeded to the same. On her death it came into the possession of Padam Singh, said to be the adopted son of Pem Singh. One Mohar Singh sued to set aside the alleged adoption and to obtain possession of the property as the sole heir of Pem Singh. The suit went up to Her Majesty in Council. It was there determined that Mohar Singh was only one of the heirs and not the sole heir of Pem Singh. In order that it might be determined who were the other heirs and what the extent of Mohar Singh's right of inheritance in the property was, Her Majesty in Council remanded the suit to the High Court. While the suit was before Her Majesty in Council, Mohar Singh died, and his son, Udai Singh, entered into an agreement with Phul Singh and Nathi Singh, the surviving sons of

* Miscellaneous Regular Appeal, No. 50 of 1876, from an order of Babu Kashi Nath Biswas, Subordinate Judge of Moerut, dated the 31st July 1876.

Dharajit, one of the heirs of Pem Singh, by which Phul Singh and Nathi Singh surrendered their rights of inheritance in the property to Udai Singh. The High Court determined on remand that Mohar Singh and Dharajit were entitled to succeed to the property in equal shares. A decree was therefore given to Udai Singh for possession of a moiety of the property and in execution of that decree he obtained possession of such moiety. Subsequently Bharat Singh, Ranjit Singh and Bholo Singh, the [458] sons of Kundan Singh, a third son of Dharajit, who had died in his father's lifetime, sued Phul Singh, Nathi Singh, and the heirs of Padam Singh to obtain possession of one-third of the moiety of the property which had remained in the possession of Padam Singh. Udai Singh was added as a defendant in this suit on his own application. At the same time he brought a suit against the sons of Kundan Singh, the heirs of Padam Singh, Phul Singh, and Nathi Singh, in which he claimed the moiety in virtue of the agreement with him entered into by Phul Singh and Nathi Singh. These suits were tried together. In the first suit it was held by the Court of First Instance that the sons of Kundan Singh were entitled to a third share of the moiety and a decree to that effect was given them. In the second suit Udai Singh obtained a decree for two-thirds of the moiety, his claim to one-third being dismissed. The heirs of Padam Singh did not appeal from either of these decrees. Udai Singh appealed to the High Court from the decree in the first suit, but not from the decree in the second. Phul Singh and Nathi Singh appealed to the High Court from the decree in the second. The decree in the first suit was reversed by the High Court, that in the second affirmed. Subsequently Udai Singh appealed from the decree in the second suit, and obtained a decree for the whole moiety. The sons of Kundan Singh appealed to Her Majesty in Council only from the decree of the High Court in the first suit, and the decree of the High Court was reversed, and that of the Court of First Instance restored. In the meantime Udai Singh, in execution of the decree of the High Court in the second suit, obtained possession of the whole moiety.

The sons of Kundan Singh applied to the Court of First Instance to obtain possession of one-third of the moiety in execution of the decree which they had obtained from Her Majesty in Council. Udai Singh objected that that decree could not be enforced against him. The Court of First Instance disallowed this objection, whereupon Udai Singh appealed to the High Court from the order disallowing the same, contending that, having obtained possession of the moiety under a decree of the High Court which had become final, he could not now be dispossessed under the decree of Her Majesty in Council.

[459] The case came on for hearing before STUART, C.J., and OLDFIELD, J., by whom the question whether the application for the execution of the decree of Her Majesty in Council might be granted was referred to a Full Bench.

Mr. Conlan, Munshi Hanuman Prasad, and the Senior Government Pleader (Lala Juala Prasad), for the Appellant.

Pandits Bishambhar Nath and Nand Lal, for the Respondents.

Pearson, (TURNER, SPANKIE, and OLDFIELD, JJ., concurring) :—The decree of the Privy Council must be executed, notwithstanding its execution involves the disturbance of the possession obtained by Udai Singh under the decree of this Court which has become final. The decree of the Privy Council is the later in date, and had Udai Singh desired to secure his possession, he should have pleaded the decree of this Court in the cross-suit when the suit in which the decree of the Privy Council has been passed was before that tribunal in appeal.

Stuart, C.J.—Under the peculiar circumstances of this case, I do not think that I ought to withhold my assent to the order agreed to by my colleagues, although I desire to guard myself against the opinion, as matter of law, that the decree of the Privy Council is as such a better decree than the decree of any other Court of a prior date and which has become final.

[1 All. 460]

APPELLATE CIVIL.

The 27th July, 1877.

PRESENT:

MR. JUSTICE PEARSON, AND MR. JUSTICE SPANKIE.

Bhagwan Singh and another.....Plaintiffs

versus

Murli Singh and another.....Defendants.*

Act XVIII of 1873 (North-Western Provinces Rent Act), s. 7—Exproprietary Tenant—Sir land—Mortgage of proprietary rights in a Mahal.

Where a person mortgaged his proprietary rights in a mahal, which rights consisted of certain lands occupied by him, covenanting to give the [460] mortgagee possession for the purpose of cultivation and the payment of Government revenue, and being at liberty to redeem the lands at any time at the end of the month Jaith, such person could not resist a claim on the part of the mortgagee for possession of the lands on the ground that he had a right of occupancy in the lands under s. 7 of Act XVIII of 1873 such section not being applicable, and contemplating something more than a mere temporary transfer of proprietary rights.

THIS was a suit in which the plaintiffs claimed from the defendants' possession of 32 bighas 9 biswas of land which comprised the proprietary rights of the defendants in a certain mahal. These lands, which the defendants themselves cultivated, were mortgaged by them to the plaintiffs on the understanding that the plaintiffs were to occupy the same, that they should pay the Government revenue, and that the defendants might redeem the lands at any time at the end of the month Jaith.

The defendants failed to give the plaintiffs possession, and the latter consequently brought this suit. The Court of First Instance gave the plaintiffs a decree. On appeal by the defendants the Lower Appellate Court held that they had a right of occupancy in the lands, under the provisions of s. 7 of Act XVIII of 1873, and modified the decree of the Court of First Instance, giving the plaintiffs a decree "for declaration of right and possession as mortgagees by preservation of the defendants' tenancy-rights."

On special appeal by the plaintiffs to the High Court, it was contended by them that s. 7 of Act XVIII of 1873 was not applicable, and that they were entitled to the possession of the lands.

Munshi Hanuman Prasad, for the Appellants.

The Junior Government Pleader (Babu Dwarka Nath Banarji) and Mir Zahur Husain, for the Respondents.

* Special Appeal, No. 656 of 1877, from a decree of Maulvi Muhammad Abdul Kaum Khan, Subordinate Judge of Agra, dated the 28th April 1877, modifying a decree of Muhammad Muhi-ud-din Khan, Munsif of Jalosar, dated the 5th January 1877.

The Judgment of the Court, so far as it related to the above contention, was as follows :

Spankie, J.—We understand that the share of the defendants is expressed in bighas of which they are in possession and which they cultivate. These they have mortgaged to the plaintiffs, covenanting to give possession of the same for the purpose of cultivation and the payment of Government revenue. They can redeem the land in any year in Jaiti. Section 7 of the Rent Act does not appear [461] to apply to this case. The defendants have not lost or parted with their proprietary rights, attached to which is a certain proportion of sir land, of which they might claim, under s. 7 of Act XVIII of 1873, a right of occupancy as exproprietary tenants. The section not only contemplates something more than a mere temporary transfer of proprietary rights, but in the particular case before us the lands in the occupation of the share-holders are the measure of each man's share, and the lands of the defendants are the subject of the mortgage. The plaintiffs are entitled to a decree as claimed.

Appeal allowed.

NOTES.

[Dissented from in (1885) 7 All. 553.]

[1 All. 461]
FULL BENCH.

The 3rd August, 1877.

PRESENT :

SIR ROBERT STUART, K.T., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, AND MR. JUSTICE SPANKIE.

The Empress of India
versus
Darba and others.

Act VIII of 1873 (Northern Indian Canal and Drainage Act), s. 70—Act

*XLV of 1860 (Indian Penal Code), s. 65—Act X of 1872 (Criminal
Procedure Code), s. 309—Act I of 1868 (General Clauses Act), s. 5.*

Section 309* of the Criminal Procedure Code does not extend the period of imprisonment which may be awarded by a Magistrate under s. 65 of the Indian Penal Code, it only regulates the proceedings of Magistrates whose powers are limited (Contrast *Reg. v. Muhammad Saib, I. L. R., 1 Mad., 277.*)

*[See, 309:—In every case punishable under any law in force Imprisonment in default for the time being, with imprisonment as well as fine, in which of payment of fine. the offender is sentenced to a fine, whether with or without imprisonment, the Criminal Courts shall be guided by the provisions of sections sixty-four and sixty-five of the Indian Penal Code in awarding the period of imprisonment in default of payment of the fine.

Provided that, in no case decided by a Magistrate, where imprisonment shall have been awarded as part of the substantive sentence, shall the period of imprisonment, awarded in default of payment of the fine, exceed one-fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

Where a person is sentenced to fine only, the Magistrate may award such term of imprisonment in default of payment of fine as is allowed by law, provided the amount does not exceed the Magistrate's powers under this Act.]

THIS was a reference to the High Court by Mr. H. M. Chase, District Judge of Saharanpur, under s. 296 of Act X of 1872, of the cases of nine persons convicted under s. 70 of Act VIII of 1873 of various offences under that section. These persons were only fined. The sentences of imprisonment awarded in default of payment of the fines inflicted were all in excess of one-fourth of the maximum period of imprisonment allowed by s. 70. The reference was made on the ground that these sentences were illegal in view of s. 65 of the Indian Penal Code. TURNER, J., having held on a former occasion that such sentences were illegal in view of that section, SPANKIE, J., before whom the reference was laid, referred to a Full Bench the question whether the sentences in the cases referred were legal or illegal, thinking that s. 309 of Act X of 1872 left the matter in some doubt.

[462] The following **Judgments** were delivered by the Full Bench :—

Stuart, C.J.—The question referred to us relates to the legality or illegality of sentences passed by two Canal Deputy Magistrates on conviction before them in nine cases for offences under s. 70 of the Northern Indian Canal and Drainage Act VIII of 1873, in respect of the sentences of imprisonment awarded in default of the fines imposed, for there is no question as to the legality of the fines themselves. (The learned Chief Justice then stated the convictions and sentences and continued:) Section. 70 of Act VIII of 1873 provides that for such offences as these convicted persons "shall be liable on conviction before a Magistrate of such class as the Local Government directs in this behalf to a fine not exceeding Rs. 50, or to imprisonment not exceeding one month, or to both." There can therefore be no doubt of the legality of the fines imposed in the cases mentioned, but the sentences of imprisonment awarded respectively in default of payment of the fines are clearly illegal, as will presently appear. The Canal Act VIII of 1873 does not appear to contain any other provision for convictions under s. 70 than that I have just quoted, and it must be interpreted by reference to the general law relating to sentences in criminal cases.

That law will be found in the first place in s. 309 of the Criminal Procedure Code, the last clause of which provides that "when a person is sentenced to fine only, the Magistrate may award such term of imprisonment in default of payment of fine *as is allowed by law*, provided the amount does not exceed the Magistrate's powers under this Act." Then by the General Clauses Act I of 1868, s. 5, it is enacted that "the provisions of ss. 63 to 70, both inclusive, of the Indian Penal Code, shall apply to all fines imposed under the authority of any Act hereafter to be passed, unless such shall contain an express provision to the contrary." Act VIII of 1873 contains no express provision to the contrary of the section of the Act last quoted, and we are therefore to find the law relating to sentences of imprisonment in default of fines within the provisions of ss. 63 to 70, both inclusive, of the Indian Penal Code, and of these 64 and 65 appear to be the sections applicable to the sentences under consideration. I do not see that s. 67 has anything to do with the question, for that section deals **[463]** solely with offences "punishable with fine only," whereas the offences contemplated by s. 70 of Act VIII of 1873 involve liability "to a fine not exceeding Rs. 50, or to imprisonment not exceeding one month, or to *both*," or, as it is otherwise put in s. 65 of the Indian Penal Code, offences "punishable with imprisonment *as well as* fine." Section 64 provides: "In every case in which an offender is sentenced to a fine, it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which

imprisonment shall be in excess of any other imprisonment to which he may have been sentenced, or to which he may be liable under a commutation of a sentence : " and by s. 65 " the term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment *as well as fine.*"

Thus, at last we arrive at the rule to be applied to sentences such as are now before us, and under which the imprisonment to be awarded in default of a fine, when the offence is punishable by both penalties, is one-fourth of the term of imprisonment which is the maximum fixed for the offence. In all these canal convictions the maximum imprisonment is one month, and, therefore, the Deputy Magistrates here were not competent to award more than one-fourth of the month, or say one week, and this, of course, under the General Clauses Act I of 1868, s. 2, cl. 18, applies to either description of imprisonment, simple or rigorous.

From all this it is very clear that the sentences of imprisonment in default of the fines passed by these Canal Deputy Magistrates were illegal, and to that extent they ought to be quashed. It is otherwise, as I have already remarked, as to the fines, which, however, we are informed have all been paid.

Pearson, (TURNER and SPANKIE, JJ., concurring) : Offences under the Canal Act may be punished by fine not exceeding Rs. 50, or imprisonment not exceeding one month, or both. The 64th section of the Indian Penal Code enables the Court, in every case in which an offender is sentenced to fine, to direct that in default of payment of the fine the offender shall suffer imprisonment. The 65th and [464] 67th sections of the Indian Penal Code declare what shall be the limit of this imprisonment. When an offence is punishable with imprisonment *as well as fine*, the imprisonment which can be awarded in default of payment of fine is limited, by s. 65, Indian Penal Code, to one-fourth the maximum fixed for the offence; but if the offence be punishable with fine only, it was necessary to set up another standard, and accordingly by s. 67, Indian Penal Code, a scale was fixed varying with the amount of fine which could be imposed.

It may be admitted that in some few instances these sections work an anomaly in that when fine alone is imposed as the punishment for an offence punishable with fine, or imprisonment, or both, the term of imprisonment to which an offender may be sentenced in default of payment of the fine is less than could be awarded in default of payment of a fine of equal amount imposed for an offence punishable with fine only. Thus, if for affray, an offence punishable with imprisonment, or fine, or both, an offender be sentenced under s. 160 of the Indian Penal Code to a fine of Rs. 50, the imprisonment which can be awarded in default is limited to one-fourth of a month, while if an owner of land be convicted under s. 154 of the Indian Penal Code for omitting to give information of a riot, an offence punishable with fine only, and be sentenced to pay a fine of Rs. 50, he can be sentenced in default of payment of the fine to imprisonment for two months. This anomaly can occur but in few instances, and it is not very important, because the Court is not confined, in sentencing an offender for an offence punishable by fine, or imprisonment, or both, to inflict a fine only, but may also impose a substantive sentence of imprisonment. Moreover, the imprisonment imposed in default of payment of fine does not if suffered satisfy the fine, but the fine may, nevertheless, be levied on the property of the offender if any can be found.

The 309th section of the Code of Criminal Procedure make ss. 64 and 65 of the Indian Penal Code applicable not only to offences punishable under the Penal Code, but to offences punishable under any law in force for the time being, and therefore applicable to offences punishable under the Canal Act. The provisos to that section do not extend the period of imprisonment which may be awarded under the provisions of s. 65 of the Indian Penal Code, [465] otherwise they would not be confined to Magistrates, but would be extended to all Criminal Courts. They were enacted then to regulate the proceedings of Magistrates whose powers are limited. Thus, although a Court of Session, in sentencing an offender for criminal breach of trust, may, in addition to imprisonment and fine, sentence the offender, in default of payment of the fine, to undergo imprisonment for nine months, or one-fourth the maximum of imprisonment which may be awarded for the offence, a Magistrate of the second class, whose powers are limited to six months, convicting an offender of the same offence, and punishing him with fine and imprisonment, can only sentence him, in default of payment of fine, to undergo imprisonment for one-fourth of six months, although if he punishes the offender with fine only, he may, under the second proviso to s. 309 of the Code of Criminal Procedure, award six months as the period of imprisonment to be undergone in default of payment of fine, the term allowed by law being nine months. These observations may serve to explain the object of the provisos, which it has been suggested may extend the powers of Magistrates so as to authorise the imposition of a longer term of imprisonment than could be awarded under s. 65 of the Indian Penal Code.

In the case of a canal offence, which is punishable with fine and imprisonment, the maximum period of imprisonment in default of payment of fine allowed by law is one-fourth of one month, and if the Magistrate punishes an offender for such an offence with fine only, he can award, in default of payment of the fine, no longer term.

NOTES.

[See 10 Mad. 165.]

[1 All. 466]

PRIVY COUNCIL.

The 13th June, 1877.

PRESENT :

SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE
E. SMITH, AND SIR ROBERT P. COLLIER.

Muhammad Ewaz and others.....Plaintiffs

versus

Birj Lal and another.....Defendants.

[On appeal from the High Court of Judicature, North-Western Provinces.]

The Indian Registration Act VIII of 1871-- Construction of s. 35-- Non-compliance with provisions of.

The words of s. 35* of the Indian Registration Act, VIII of 1871, which provide that " If all or any of the persons by whom the document (*i. e.*, the document presented for registration) purports to be executed deny its [466] execution, or if any such person appears to be a minor, an idiot, or a lunatic, or if any person by whom the document purports to be executed is dead and his representative or assign denies its execution, the registering officer shall refuse to register the document," taken literally, seem to require the registering officer to refuse registration of a deed which purports to be executed by several persons if any one of them deny execution, or appear to be a minor, an idiot, or a lunatic.

Since such a construction would cause great difficulty and injustice, and would be inconsistent with the language and tenor of the rest of the Act, the words in question must be read distributively, and construed to mean that the registering officer shall refuse to register the document *quoad* the persons who deny the execution of the deed, and *quoad* such persons as appear to be under any of the disabilities mentioned.

The registration of a deed is not necessarily invalid by reason of a failure on the part of the registering officer to comply with the provisions of the Registration Act.

Sah Mukhun Lall Panday v. Sah Koondun Lall (15 B. L. R., 228; S. C., L. R. 2 Ind. Ap., 210; 24 W. R., 75) referred to and approved.

*[Sec. 35 :—If all the persons executing the document appear personally before the registering officer and are personally known to him, or if he be otherwise

Procedure on admission satisfied that they are the persons they represent themselves to be, and if they all admit the execution of the document; or, in the case of any person appearing by a representative, assign or agent, if such representative, assign or agent admits the execution; or, if the person executing the document is dead, and his representative or assign appears before the registering officer, and admits the execution, the registering officer shall register the document as directed in sections fifty-eight to sixty-one inclusive.

The registering officer may, in order to satisfy himself that the persons appearing before him are the persons they represent themselves to be, or for any other purpose contemplated by this Act, examine any one present in his office.

If all or any of the persons by whom the document purports to be executed deny its execution, or if any such person appears to be a minor, an idiot, or a lunatic, or if any person by whom the document purports to be executed is dead, and his representative or assign denies its execution, the registering officer shall refuse to register the document.

Nothing in section thirty-four, or the former part of this section, applies to copies of decrees or orders.]

THIS was an appeal from a decree of the High Court at Allahabad, dated the 16th March 1875, reversing decrees of the Judge and Subordinate Judge of Bareilly in favour of the appellants (see H. C. R., N.-W. P., 1875, p. 185).

The question of law involved in the case was as to the admissibility in evidence and the effect of a deed of sale of shares in certain villages purporting to be executed by three persons, which had been admitted to registration by the registering officer, although only two of the persons purporting to execute attended before him and admitted execution, and execution was denied on behalf of the third.

The High Court in the judgment under appeal held that the registration of the deed was wholly invalid, and that it consequently could not be received in evidence even against the parties admitting execution.

The facts of the case and the material issues arising therein are fully disclosed in their Lordships' judgment.

Mr. Cowie, Q. C., and Mr. Graham, for the Appellants, contended that there had been a full compliance with the provisions of the Registration Act, and that, at any rate, the registration was good as against the two vendors who appeared before the Registrar [467] and admitted execution. *Futteh Chand Sahoo v. Leelumber Singh Dass* (14 Moore's Ind. Ap., 129) and *Sah Mukhun Lall Panday v. Sah Koondun Lall* (15 B. L. R., 228; s. c., L. R., 2 Ind. Ap. 210; 24 W. R., 75) were cited.

Mr. Doyne for the Respondents: The Appellants' instrument of sale had not been registered in accordance with the Registration Act, s. 35, and, therefore, under s. 49 of that Act, did not affect any of the properties comprised therein, and was not receivable in evidence.

Mr. Cowie replied.

At the close of the argument their Lordships' **Judgment** was delivered by

Sir Montague E. Smith.—This is a suit brought by the appellants, the sons and heirs of Shere Muhammad, the vendee under a deed of sale which on the face of it purports to have been made by three persons, Mubarak Jan, and her two sons, Hyat Muhammad and Salamatulla. The sale was of certain shares in two mauzas, the shares which each held not being specified. It must be taken, however, on this appeal, that although the amount of the shares to which each of the parties was entitled is not yet ascertained, the shares were held in such a manner that each might separately dispose of his own shares. The respondents, who are purchasers under a subsequent deed of sale, and who impeach the deed of sale to Shere Muhammad, contend that the last-mentioned deed cannot be read in evidence because it was not properly registered. The deed has been in point of fact registered, and it lies upon the respondents, who impeach that registration, to show the facts which invalidate it. They have not proved that the shares were held jointly, nor does it appear that that point was made in either of the appeals below.

The Subordinate Judge of Bareilly and the Judge of Bareilly, to whom the case went from the Subordinate Judge on appeal, found that the mother had not executed the deed, but that the two sons had done so, and a decree was given by the Subordinate Judge, which was affirmed by the Judge, in these terms: "That a decree be given to the plaintiff for the completion of the sale-[469]deed, dated 14th January 1874, to the extent of the rights of Hyat Muhammad and Salamatulla, defendants, in the shares of mauzas Tah and Kashinpur Maupur against the said defendants and the vendees, and the claim for possession of the said shares, and for the rights of Musannat Mubarak Jan, be dismissed." That decree may be taken to be a declaration that the appellants, as the heirs of the vendee, are entitled to the rights, whatever they

were, of Hynt Muhammad and Salamatulla in these mauzas. The decree goes no further, it refuses to decree possession ; and, from the reasons given by the judge for his decree, it would seem that the amount of the shares to which each was entitled had not been proved before him.

From these judgments there was a special appeal to the High Court, and the only question upon which the High Court decided, and which alone their Lordships think it material to consider, is that of registration. The High Court came to the conclusion that the registration of the deed of sale to Shere Muhammad was null, because the requisites of the Registration Act had not been complied with.

It appears that the deed was brought to the Registrar on the 15th January ; the vendors did not attend, and it became necessary to summon them. The two sons appeared on the following day, and admitted their own execution, but denied that of their mother. The deed purports to have been executed by the two sons, each in his own handwriting, and by the mother, Musammat Mubarak Jan, by the hand of Hyat Muhammad. The sons admitted their own signatures and execution, but stated that their mother had not assented to the sale. The Sub-Registrar made the endorsements which are found upon the deed, and which consist of three separate paragraphs. The first endorsement was made on the 15th January, the day on which the deed was presented for registration, and is to the effect that the deed between the hours of 10 and 11 was presented for registration in the office of the Officiating Sub-Registrar by Chotay Lal, the agent of the vendee, who also applied for the compulsory attendance of the vendors.

The two sons having attended on the following day, and made the admissions and statement above referred to, the Sub-Registrar [469] made this endorsement : "Hyat Muhammad and Salamatulla, sons of Amirulla (sect Shaikh Panjabi, occupation zamindari), and residents of Pilibhit, in the district of Bareilly, two of the three vendors named in this sale-deed, were identified," and so on, stating the identity, "and their written depositions were taken down on separate papers, according to the application of the manager of the vendee for the compulsory attendance of the vendors. The said vendors admitted before me, in their written deposition, that they had executed the sale-deed now in the office, including therein the name of their mother, and completed it by having it duly signed and witnessed, but that they had this sale-deed drawn up without consulting their mother, and she was not a consenting party to it ; that they had not received any money from this vendee, and they, having received a larger amount of consideration from Baijnath, etc., executed a sale-deed in their favour, and had it registered, and that they had no mind to have this sale-deed registered." The last statement, that they had no mind to have the deed registered, appears to have been treated as a refusal on their part to endorse the document ; but the Act gives power to the Registrar to register, notwithstanding such a refusal, and accordingly the Registrar did register the deed in the formal manner required by the Act, and made this formal endorsement of registration upon the instrument : "This document is registered at No. 40, page 299, vol. 11, Register No. 1, on 16th January 1874."

The deed of sale to the respondents, which also bears date on the 14th January 1874, had been brought to the Registry on the 15th ; and all the vendors having admitted, either by themselves or their agent, that that deed had been executed, it was registered on that day. Nothing, however, turns upon the priority of the registration of this deed, because by the provisions of the Act a deed operates not from the time of its registration, but from the time when it

would have commenced to operate if no registration had been required. If, therefore, a deed is tendered for registration within the time prescribed by the Act, and registered, it is immaterial that another deed has obtained priority of registration.

These being the facts of the case, the High Court have decided that the execution of the deed not having been admitted by the [470] mother and her authority for its execution having been denied, it was improperly registered, and could not be received in evidence as against the sons. The decision is founded mainly on the 35th section of the last Registration Act, VIII of 1871. Before coming to that section it will be right to call attention to the scheme of the Act, with a view to see whether the general provisions do not furnish a context by which to construe the language used in the 35th section.

The 17th section describes the documents required to be registered. The 23rd prescribes the time within which deeds are to be presented for registration, viz., a period of four months after their execution; and there is a proviso to that section to which it is material to call attention. It is this: "Provided that where there are several persons executing a document at different times, such document may be presented for registration and re-registration within four months from the date of each execution." It is plain that under that proviso a deed, say, by several vendors, may be registered as to one or two of them when one or two have executed the deed, and may be again registered when others have at a later period executed it. Then come the 34th and 35th sections, which are the most important sections to be considered. The 34th enacts that, "Subject to the provisions contained in this part and in sections 41, 43, 45, 69, 76 and 86, no document shall be registered under this Act, unless the persons executing such document or their representatives, assigns, or agents authorised as aforesaid appear before the registering officer within the time allowed for presentation." There the persons described are the persons executing the document;—not those who on the face of the deed are parties to it, or by whom it purports to have been executed, but those who have actually executed it. Then there is power to enlarge the time, and a provision that the appearances may be simultaneous or at different times. Then "the registering officer shall thereupon inquire whether or not such document was executed by the persons by whom it purports to have been executed," and "satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document, and, in the case of any person appearing as a representative, assign, or agent, satisfy himself of the right of such person so to appear." The 35th section is: "If all the persons executing [471] the document"—again, not "purporting to execute it,"—but "if all the persons executing the document appear personally before the registering officer and are personally known to him, or if he be otherwise satisfied that they are the persons they represent themselves to be, and if they all admit the execution of the document, or, in the case of any person appearing by a representative, assign, or agent, if such representative, assign, or agent admits the execution, or if the person executing the document is dead and his representative or assign appears before the registering officer and admits the execution, the registering officer shall register the document as directed in sections 58 to 61 inclusive." Then comes the enactment which occasions the difficulty: "If all or any of the persons by whom the document purports to be executed deny its execution, or if any such person appears to be a minor, an idiot, or a lunatic, or if any person by whom the document purports to be executed is dead and his representative or assign denies its execution, the registering officer shall refuse to register the document." These words, taken literally, undoubtedly seem to require the registering officer to refuse to register a deed which purports to be executed by several persons if any one of those persons deny the execution.

Such a construction, however, would cause great difficulty and injustice, which it cannot be supposed the Legislature contemplated, and would be inconsistent with the language and tenor of the rest of the Act; their Lordships, therefore, think the words should be read distributively, and be construed to mean that the registering officer shall refuse to register the document *quoad* the persons who deny the execution of the deed, and *quoad* any person who appears to be a minor, an idiot, or a lunatic. There appears to be no reason for extending the clause further than this, so as to destroy the operation of the deed as regards those who admit the execution, and who are under no disability, which would be the practical effect of a refusal to register at all. The proviso in the 23rd* section to which allusion has already been made shows that the Legislature contemplated a partial registration of a deed, that is, partial as to the persons executing it. Now it would be extremely difficult to give effect to this enactment in the 35th clause in its literal meaning, and at the same time to give effect to the proviso in the 23rd clause. To do [472] so would certainly create an anomaly. Supposing three vendors live in different places, and are called upon at different times to execute the deed of sale, in that case there undoubtedly may be three several registrations. Supposing No. 1 and No. 2 attend the Registrar and admit the execution of the deed, and it is registered, but No. 3 afterwards comes and denies the execution of the deed, what is to be the consequence? Is the previous registration of the two to be rendered invalid? If so, effect could not be given to the proviso. And if that registration is not to be invalid, what difference in principle can there be between the case where three vendors appear at different times to admit or deny the execution, and where they appear at the same time to admit or deny the same fact? That which is required of them is precisely the same in both cases, and the admission and denial ought in reason to have the same effect in both.

Their Lordships cannot but think that considerable light is thrown upon the intention of the Legislature by the provision that there may be under the circumstances mentioned a registration and re-registration of the same document.

Again, the registering officer is to refuse to register, not only in the case of persons who deny the execution of the deed, but in the case of persons who appear—that is, who appear to him to be minors, or idiots, or lunatics. Suppose a deed executed by three persons, two of whom were under no disability, and who admit their execution, but the third had become a lunatic, it would follow, if the construction contended for by the respondents were to prevail, that that deed could not be registered against the persons who admitted their execution, and who were under no disability. The consequences of such a construction would be so injurious that it cannot be supposed that the Legislature intended to produce them. The consequences of non-registration are pointed out in the 49th section, and are of the most stringent description:—“No document required by section 17 to be registered shall affect any immovable property comprised therein, or confer any power to adopt, or be received

*[Sec. 23.—Subject to the provisions contained in sections twenty-four, twenty-five and twenty-six, no document required by section seventeen to be registered, and no document mentioned in section eighteen, other documents of which the than a will, shall be accepted for registration unless presented registration is compulsory. for that purpose to the proper officer within four months from the date of its execution:

Or in the case of a copy of a decree or order, within four months from the day on which the decree or order was made, or, where it is appealable, within four months from the day on which it becomes final:

Provided that, where there are several persons executing a document at different times, such document may be presented for registration and re-registration within four months from the date of each execution.]

as evidence of any transaction affecting such property or conferring such power, unless it has been registered in accordance with the provisions of this Act." The effect, therefore, in the case [473] which has just been supposed, would be that the deed could not be given in evidence against those who had executed it, and who were under no disability, because some other person interested in the property, and made a party to it, had become lunatic (it may be after the execution), or appeared to the Registrar to be lunatic. No injustice is done by admitting a deed to registration, because the effect is no more than to satisfy an onerous condition before the deed can be given in evidence; and when in evidence, it is subject to every objection that can be made to it precisely as if no registration had taken place; whereas when registration is refused, the effect may be to deprive the party altogether of perfectly good rights which he might have under the deed but for the Registration Act.

The Act gives little discretion to the Sub-Registrar. He is bound either to register or not to register when he is satisfied by the admission or denial of the parties that the deed has been executed, and no discretion is given to him to inquire further into the matter. He can only obtain from the parties or their agents the admission or the denial. But provision is made for an appeal from his refusal to register to the District Court, and that Court is empowered to go into evidence, and if the District Judge is satisfied that the deed was executed by the parties, he is then to order the registration. The power of that Court, however, does not and could not arise in this case, because in point of fact the Sub-Registrar did register the deed.

Their Lordships do not think it necessary to refer specifically to the other sections in the Act. They have referred to those which furnish, in their view, a context to explain and cut down the generality of the words used in the 35th section.

This point will of course dispose of the appeal. But there is another part of the judgment of the High Court which their Lordships think requires consideration. The High Court say: "It has been held by this Court more than once that unless a deed be registered in accordance with the substantial provisions of the law, it must be regarded as unregistered, though it may in fact have been improperly admitted to registration." Their Lordships think this is too broadly stated, if the High Court is to be understood to mean that in all cases where a registered deed is produced, it is open to the party objecting to the deed to contend that there [474] was an improper registration, that the terms of the Registration Act in some substantial respects have not been complied with. Undoubtedly it would be a most inconvenient rule if it were to be laid down generally that all Courts, upon the production of a deed which has the Registrar's endorsement of due registration, should be called on to inquire, before receiving it in evidence, whether the Registrar had properly performed his duty. Their Lordships think that this rule ought not to be thus broadly laid down. The registration is mainly required for the purpose of giving notoriety to the deed, and it is required under the penalty that the deed shall not be given in evidence unless it be registered. If it be registered, the party who has presented it for registration is then under the Act in a position which *prima facie* at least entitles him to give the deed in evidence. If the registration could at any time, at whatever distance of time, be opened, parties would never know what to rely upon, or when they would be safe. If the Registrar refuses to register, there is at once a remedy by an appeal; but if he has registered, there is nothing more to be done. Supposing, indeed, the registration to be obtained by fraud, then the act of registration, like all other acts which have been so arrived at, might be set aside by a proper proceeding. The 60th section

is : " After such of the provisions of sections 34, 35, 58, and 59 as apply to any documents presented for registration have been complied with, the registering officer shall endorse thereon a certificate containing the word ' registered,' together with the number and page of the book in which the document has been copied. Such certificate shall be signed, sealed, and dated by the registering officer, and shall then be admissible for the purpose of proving that the document has been duly registered in manner provided by this Act, and that the facts mentioned in the endorsements referred to in section 59 have occurred as therein mentioned." The certificate is that which gives the document the character of a registered instrument, and the Act expressly says that that certificate shall be sufficient to allow of its admissibility in evidence. Then by the 85th clause it is enacted that " Nothing done in good faith pursuant to this Act, or any Act hereby repudged, by any registering officer, shall be deemed invalid merely by reason of any defect in his appointment or procedure." No doubt, in this case, [476] the fact of the non-admission of the mother's execution appears upon the endorsement made on the deed itself, and did not require to be proved *aliquid*; but the observations in the judgment go beyond the particular case.

This point does not come before their Lordships for the first time. It was a good deal considered in the case to which Mr. Cowie has referred, *Sah Makhun Lall Panday v. Sah Koondun Lall* (15 B. L. R., 228; S.C., L. R., 2 Ind. Ap., 210 : 24 W. R. 75); and although it was not there necessary to decide the point,—indeed the point did not arise, and the appeal was decided upon another ground,—yet the considerations to which their Lordships have just adverted were discussed in the judgment in this way :—" Now considering that the registration of all conveyances of immoveable property of the value of Rs. 100 or upwards is by the Act rendered compulsory, and that proper legal advice is not generally accessible to persons taking conveyances of land of small value, it is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of sections 19, 21, or 36, or other similar provisions." It may be observed that section 36 in the former Act is the equivalent of section 35 in the present Act. " It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general words ' defect in procedure ' in section 88 of the Act,"—which is the same as section 85 in the present Act,—" so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer on whom they would naturally place reliance. If the registering officer refuses to register, the mistake may be rectified upon appeal under section 83, or upon petition under section 84, as the case may be; but if he registers where he ought not to register, innocent persons may be misled, and may not discover until it is too late to rectify it, the error by which, if the registration is in consequence of it to be treated as a nullity, they may be deprived of their just rights."

It is to be observed, with regard to the inconvenience which it is suggested may arise from a deed being registered when some [476] only of the parties to it have executed it, that provision is made for disclosing the parties who have really executed the deed. A copy of the deed is to be made in a book, and there are to be indexes, and it is directed that " Index No. 1 shall contain the names and additions of all persons executing, and of all persons claiming under, every document copied into or memorandum filed in book No. 1 or book No. 3." So that anyone consulting the register would find a copy of this deed, and that the two sons only had executed it, and that the mother had not.

On these grounds their Lordships think that the decree of the High Court cannot be sustained, and they will humbly advise Her Majesty to reverse it, and to order that the appeal from the decree of the Judge of Bareilly to the High Court be dismissed with costs, and that the last-mentioned decree be affirmed. The appellants, will have the costs of this appeal.

Agents for the Appellants : *Messrs. Watkins & Lattey.*

Agents for the Respondents : *Messrs. W. & A. Ranken Ford.*

[1 ALL. 476]

APPELLATE CIVIL.

The 10th August, 1877.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR. JUSTICE TURNER.

Manohar Lal.....Defendant

versus

Gauri Shankar.....Plaintiff.*

Act XXXV of 1858, s. 9—Act XIX of 1873 (North-Western Provinces' Land Revenue Act), ss. 194, 195—Lunatic- Court of Wards.

Section 9^t of Act XXXV of 1858 and s. 195 of Act XIX of 1873 do not render it imperative on the Court of Wards to take charge of the estate of a person adjudged by a Civil Court, under Act XXXV of 1858, to be of unsound mind, but merely confer on that Court a power so to do. Until the Court of Wards exercises that power, the appointment by the Civil Court of a manager of the lunatic's property, under s. 9^t of Act XXXV of 1858, is valid.

NOTES.

I. STATUTORY CHANGE.—

By Act XII of 1879 the Registration Act of 1877 was amended by the insertion of the words *italicised*, “the registering officer shall refuse to register the document *as to the person so denying, appearing or dead.*” These are also in the Act of 1908.

II. OTHER CASES.—

Registration has been held valid in these cases :—On admission of signature though coupled with denial of execution :—(1901) 6 C. W. N. 329 ; by father for self and as guardian of minor son :—(1899) 21 All. 281 F. B. [see also (1883) 5 All. 599] ; by an agent not coming within the Act :—(1882) 4 All. 384 ; (1889) 11 All. 319 ; presented at one's residence :—(1881) 6 Bom. 96.

In the following cases, registration has been held invalid :—When executant was absent (by reason of death) :—(1900) 23 All. 233 ; when beyond time :—(1907) 5 C. L. J. 188 ; misdescription of sub-district :—(1891) 18 Cal. 556 ; 18 Mad. 364 ; small part within jurisdiction :—(1885) 7 All. 590 ; but see (1886) 1 C. P. L. R. 11 ; on denial of execution :—(1903) 26 All. 57.]

* Regular Appeal, No. 34 of 1877, from a decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 18th December 1876.

† [Sec. 9 :—When a person has been adjudged to be of unsound mind, and incapable of managing his affairs, if the estate of such person or any part thereof, consist of property which by the law in force in any Presidency subjects the proprietor, if disqualified, to the superintendence of the Court of Wards, the Court of Wards shall be authorized to take charge of the same. In all other cases, except as otherwise hereinafter provided, the Civil Court shall appoint a Manager of the estate. Any near relative of the Lunatic, or the Public Curator, or, if there be no Public Curator, any other suitable person, may be appointed Manager.]

In all other cases.

Who may be appointed Manager.

I.L.R. 1 All. 477 MANOHAR LAL v. GAURI SHANKAR [1877]

THIS was a suit for possession of a six-anna share in mauza Mahewapura, pargana Arail, zila Allahabad. This mauza was the joint and undivided property in equal shares of Gauri Shankar and his brother Har Shankar. Har Shankar sold a twelve-anna share to Manohar Lal. One Dalthamman Singh brought the present suit on behalf of Gauri Shankar, alleged to have become a lunatic, to [477] set aside the sale so far as Gauri Shankar was concerned. The circumstances under which Dalthamman Singh came to sue were as follows :

On the 23rd June 1874, a petition was presented to the District Judge of Allahabad by Narain Kuar, representing herself to be the aunt of Gauri Shankar, in which, after alleging that Gauri Shankar had become insane and incapable of managing his affairs, and that his brother Har Shankar was dissipating the joint estate, she prayed that the Court would hold an inquiry under Act XXXV of 1858, and would appoint a manager of the estate of the lunatic. An inquiry was accordingly made, and on the 14th August 1874, Gauri Shankar was pronounced by the District Judge to be a lunatic, and Dalthamman Singh was appointed as manager of Gauri Shankar's estate.

The Court of First Instance gave the plaintiff a decree.

On appeal by the defendant to the High Court it was contended by him that, inasmuch as the estate of the lunatic included property which subjected the proprietor, if disqualified, to the superintendence of the Court of Wards, charge of the estate devolved on the Court of Wards, and the District Judge had no power to appoint a manager, and Dalthamman Singh was not competent to bring the suit.

Babu Oprokash Chandar Mukarji and the Junior Government Pleader (Babu Dwarka Nath Banerji), for the Appellant.

Mr. Colvin, Munshis Sukh Ram and Ram Prasad, for the Respondent.

The **Judgment** of the High Court, so far as it related to this contention, was as follows :—

The Act (XXXV of 1858) declares that when a person possessing such property is adjudged to be of unsound mind and incapable of managing his affairs, the Court of Wards " shall be authorised to take charge of the estate " and that " in all other cases " except as otherwise thereafter provided, the Civil Court shall appoint a manager of the estate. The Act, it will be observed, does not render it imperative on the Court of Wards to take charge of the estate, but merely confers on the Court of Wards authority to do so. Similarly, the 194th section of Act XIX of 1873 includes lunatic [478] landholders among disqualified persons, and the 195th section of the same Act declares the Court of Wards competent in its discretion to assume or refrain from assuming the superintendence of the person or property of any disqualified person. If, as has been contended, we are to construe the 9th section of Act XXXV of 1858 as conferring on the District Court no authority to appoint a manager of the estate of a lunatic landholder, it follows that, where the Court of Wards abstains from exercising the authority conferred on it and taking charge of the estate, the property of the lunatic will be left unprotected. In our judgment this could not have been the intention of the Legislature, and the language of the Act admits of a reasonable construction which would avoid the anomaly. We consider that the term " in all other cases " applies not only to cases in which no part of the estate would subject the lunatic to the superintendence of the Court of Wards, but also to cases in which the Court of Wards, having authority to assume the superintendence of the property, has not exercised that power. Ordinarily, before appointing a manager in such cases, the District Judge should allow the Court of Wards an opportunity to declare its election, but we

can conceive cases in which it may be essential for the protection of the estate that a manager should be at once appointed, and if subsequently the Court of Wards assumed superintendence, the appointment made by the Judge would thereupon be annulled.

In the case before us it is not suggested that the Court of Wards has assumed charge of the estate, and we hold that the appointment by the Judge remains valid and entitles the manager to maintain this suit and to verify the plaint.

NOTES.

[Followed in (1912) 15 I. C., 265 (Oudh).]

[1 All. 478]

APPELLATE CIVIL.

The 13th August, 1877.

PRESENT:

MR. JUSTICE PEARSON AND MR. JUSTICE TURNER.

Man Kuar.....Plaintiff

versus

Jasodha Kuar.....Defendant.*

Contract—Consideration—Immoral consideration—Void agreement—Act IX of 1872 (Contract Act), ss. 23, 25.

M had for many years lived with *G* as his concubine.¹ In consideration of such past cohabitation, *G*, by an agreement in writing, dated the 28th March 1869, [479] and duly registered, settled an annuity on *M*, charging a portion of his real estate with the payment of such annuity: *Held*, in a suit by *M* against *G*'s heir, his married wife, to enforce the agreement, that the consideration for the agreement was not, under the law then in force, immoral, nor was the agreement, under the same law, void for want of consideration: *Held* also that, before *M* could recover from the defendant on the agreement, it was necessary to show that the defendant had received funds available to meet the claim from the profits of the estate charged with the payment of the annuity or other property of *G*.

THIS was a suit to establish the validity of an agreement in writing, dated the 28th March 1869, and duly registered, and to recover from the defendant Rs. 442, principal and interest, under the agreement.

The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Munshi Sukh Ram and Babu Jogindro Nath Chaudhri, for the Appellant.

Mr. Conlan and Munshi Hanuman Prasad, for the Respondent.

The material portion of the High Court's Judgment was as follows:—

The appellant sued to enforce the provisions of a contract whereby one Gajadhar Singh, now deceased, had settled on her an annuity of Rs. 800 secured by a charge on his estate mauza Laklnaura. The appellant had lived for many years with the settlor as his concubine, and there seems no reason to doubt he was attached to her and desired to make a suitable provision for her. The respondent, the married wife of the deceased, pleaded that the deed was void under the provisions of the Indian Contract Act, s. 23, having been

* Regular Appeal, No. 90 of 1876, from a decree of Maulvi Hamid Hasan Khan, Subordinate Judge of Mainpuri, dated the 10th July 1876.

executed for an immoral consideration, and if not, that it was void under the provisions of s. 25 of the same Act, it having been executed without consideration,.....and that the ancestral estate was so much encumbered that its profits were insufficient to defray the charges for interest. The Indian Contract Act had not been passed on the 28th March 1869, when the deed on which suit is brought was executed. We need not, therefore, consider whether under the provisions of that Act it would be void. But if the consideration was immoral, as the Court below has held, it would be void under the law administered [480] by the Courts of this country before the Act was passed. In our judgment the consideration was not immoral. The annuity was created not in consideration of future cohabitation, which would be an immoral consideration, but to make provision for a woman for whom it was incumbent on the honour of the settlor to make some provision. Nor, as the law stood when the deed was executed, would it have been held that such a contract was void for want of consideration.....There remains, however, a plea which has not formed the subject of an issue in the Court below. Before the appellant can recover from the respondent, it must be shown that the respondent has received funds available to meet the claim from the profits of Lakhnaura or other property of the deceased. We remand this issue for trial under s. 354.

Cause remanded.

NOTES.

[AGREEMENT SUPPORTED BY PAST COHABITATION.—

The same view as in this case was taken in (1881) 3 All. 787; see also the opinion of BHASHYAM AYYANGAR in (1903) 18 M. I. J., 7, at 18; and the criticisms of Messrs. Pollock and Mulla in their Indian Contract Act, 3rd Edition (1918), at pp. 181, 160. But the Allahabad High Court has held past adulterous intercourse to be insufficient:—(1904) 27 All. 266.]

[1 All. 480]

APPELLATE CIVIL.

The 3rd August, 1877.

PRESENT :

MR. JUSTICE PEARSON AND MR. JUSTICE SPANKIE.

Man Singh.....Defendant

versus

Narayan Das and others.....Plaintiffs.*

Res judicata—*Act VIII of 1859 (Civil Procedure Code), ss. 2, 139—Trial and determination of issues.*

A Court of competent jurisdiction, having tried and determined an issue arising in a suit on which the suit might have been disposed of, proceeded to try and determine another issue which also arose out of the pleadings, but the determination of which in that suit was not required for its disposal.

Held that such Court was not bound under the circumstances to refrain from trying and determining such last-mentioned issue, and that the trial and determination of it could not be treated as a nullity, and the issue could not again be tried and determined in another suit.

* Special Appeal, No. 681 of 1877, from a decree of Maulvi Maqsud Ali Khan, Subordinate Judge of Bareilly, dated the 25th April 1877, affirming a decree of Maulvi Abdul Razq, Munsif of Bissauli, dated the 27th May 1876.

THIS was a suit on a bond for money charged on immoveable property. The bond was given on the 10th January 1864, to one Tula Ram, and charged certain immoveable property. On the 28th January 1864, the obligees of the bond sold the property [481] to Man Singh, defendant in this suit. On the 17th September 1864, Tula Ram obtained a decree on the bond against the obligees, which declared the property liable to be sold in execution of the decree. On the property being attached in execution of this decree, Man Singh objected that it was not liable to be sold. His objection being disallowed, he brought a suit against Tula Ram and the obligees of the bond to establish that the property was not liable to be sold. On the allegations of the parties to this suit the Munsif fixed as issues whether the property was liable to be sold in execution of Tula Ram's decree or not, and whether the bond was collusive or not. On the first issue he determined that the property was not liable to be sold in execution of Tula Ram's decree, as that decree, so far as it affected the property, was passed without jurisdiction. On the second he observed as follows : " I am of opinion that, though an *ex parte* decree was given in favour of Tula Ram on the bond, still as Tula Ram, defendant, could not prove the validity of the bond in this Court, the bond must be considered collusive. Had the bond been genuine, the answering defendant would not have failed to prove it." He accordingly, on the 12th December 1873, gave Man Singh a decree. Tula Ram appealed against this decree to the Judge, and against the Judge's decree, which affirmed the Munsif's, to the High Court, which affirmed the Judge's decree ; but neither before the Judge nor the High Court did he take any exception to the determination on the issue respecting the bond. The present suit on the bond was brought against Man Singh by the heirs of Tula Ram. Man Singh relied on the finding respecting the bond in the first suit as a defence to the second suit. The Court of First Instance gave the plaintiffs a decree which the lower Appellate Court affirmed, both Courts overruling the defendant's contention that the suit was barred by the finding in the former suit that the bond was collusive. On special appeal to the High Court by the defendant, it was again contended that the suit was barred by the finding in the former suit in respect of the bond.

Babu Oprokash Chunder Mukarji and Mir Zahur Husain, for the Appellant.
Munshi Hanuman Prasad and Lala Lalta Prasad, for the Respondents.

[482] **The Judgment** of the Court was delivered by

Pearson, J.—The question whether the bond on which the claim in the present suit is founded was collusive or not was distinctly raised by the pleadings in the suit formerly brought by Man Singh against Tula Ram (now represented by the present plaintiffs), was made an issue for trial, and was determined in that suit adversely to Tula Ram. The lower Appellate Court is of opinion that the finding on that issue in that suit does not preclude a re-adjudication of it in the present suit for two reasons: first, because the determination of the issue in that suit was not required for its disposal; and, secondly, because the finding by which it was determined was imperfect. We are unable to concur in the opinion. It is true that the Munsif might have disposed of the former suit without adjudicating on that issue on the basis of his findings on the other issues tried by him; but it is also true that he was perfectly justified in laying down that particular issue for trial, as it arose out of the pleadings and an adjudication on it might have been necessary, and as his finding thereon rendered his decision in the case more firm and complete. We are not prepared to hold that he was bound to refrain from adjudicating upon it under the circumstances, or that his adjudication thereon can be treated as a nullity. His finding is regarded as imperfect by the lower Appellate Court, because it proceeded on the ground that Tula Ram had failed to prove the authenticity of

the bond, rather than on any absolute proof of fraud. But, if the finding were open to objection either on the score of irrelevancy or error, the objection might have been taken in the appeal preferred by Tula Ram against the decree passed by the Munsif on the 12th December 1873, in Man Singh's favour. Tula Ram appealed to the Zila Judge and to this Court, but never took any such objection, and the finding remained undisturbed. This being so, the question determined by it must in our judgment be deemed to be a *res judicata* not open to re-adjudication. Allowing then the validity of the plea in appeal, we decree the appeal, reverse the decrees of the lower Courts, and dismiss the suit with costs in all Courts.

Appeal allowed.

NOTES.

[RES JUDICATA—FINDINGS NOT MATERIAL TO THE DECREE.—

The view here was *not* adopted in (1885) 7 All. 606 F. B.; 15 All. 3; 7 Mad. 115; (1889) P. R. 157. See also 17 All. 174.]

[483] APPELLATE CIVIL.

The 14th August, 1877.

PRESENT :

SIR ROBERT STUART, K.T., CHIEF JUSTICE, AND MR. JUSTICE PEARSON.

Eidan.....Defendant

versus

Mazhar Husain.....Plaintiff.

Muhammadan Law—Dower—Conjugal rights—Act VI of 1871 (Bengal Civil Courts' Act), s. 24.

When a Muhammadan sues his wife for restitution of conjugal rights, such suit is to be determined with reference to Muhammadan law,^t and not with reference to the general law of contract. Under Muhammadan law, if a wife's dower is "prompt," she is entitled, when her husband sues her to enforce his conjugal rights, to refuse to cohabit with him, until he has paid her dower, and that notwithstanding that she may have left his house without demanding her dower and only demands it when he sues, and notwithstanding also that she and her husband may have already cohabited with consent since their marriage. *Abdool Shukkoor v. Raheemunnissa*,[‡] followed.

When, at the time of marriage, the payment of dower has not been stipulated to be "deferred," payment of a portion of the dower must be considered "prompt." The amount of such portion is to be determined with reference to custom. Where there is no custom, it must be determined by the Court, with reference to the status of the wife and the amount of the dower.

* Special Appeal, No. 444 of 1877, from a decree of Rai Shankar Das, Subordinate Judge of Saharanpur, dated the 8th February 1877, modifying a decree of Kazi Muhammad Imdad Ali, Munsif of Saharanpur, dated the 4th November 1876.

† See also *Buzloor Itaher v. Shumsoonnissa*, 8 W. R., P. C., 8; S.C., 11 Moore's Ind. Ap. 551; in which the Privy Council held, under the law corresponding to s. 24 of Act VI of 1871, that a suit by a Muhammadan for restitution of conjugal rights must be determined with reference to Muhammadan law.

‡ H. C. R., N.-W. P., 1874, p. 94. As to the general power of a wife to refuse herself, see *Jaun Beebee v. Beparee*, 3 W. R., 93, where presumably the wife's dower was prompt.

Where a Court, following this rule, determined that one-fifth only of a dower of Rs. 5,000 not stipulated to be "deferred" must be considered "prompt," inasmuch as the wife had been a prostitute and came of a family of prostitutes it exercised its discretion soundly.

THIS was a suit by a Muhammadan for restitution of conjugal rights. The defendant pleaded that until her dower was paid the plaintiff was not, under the Muhammadan law, entitled to such restitution. This plea raised the question whether her dower was prompt or deferred. The dower had been fixed at Rs. 5,000, but [484] at the time of marriage it was not specified whether the dower was prompt or deferred. The Court of First Instance dismissed the suit. Relying on the doctrine set forth in Baillie's Digest of Muhammadan Law, the lower Appellate Court held that, where at the time of marriage it was not specified whether dower was prompt or deferred, a portion of it must be considered prompt, that the amount of such portion was to be determined with reference to custom, and that, in the absence of custom, such amount was to be determined by the Court with reference to the position of the wife and the amount of dower. It overruled the contention of the defendant based on a passage in Macnaghten's Principles of Muhammadan Law, that where there was no specification, the entire dower was prompt. In order that an inquiry might be made as to whether any, and, if any, what custom existed as to the amount of dower exigible when it was not specified whether the dower was prompt or deferred, the lower Appellate Court remanded the suit to the Court of First Instance under s. 354 of Act VIII of 1859. The Court of First Instance found that there was no custom in existence. The lower Appellate Court therefore proceeded to determine the amount of dower exigible with reference to the defendant's position and the amount of dower. As it was admitted that the defendant had been a prostitute and came of a family of prostitutes, the lower Appellate Court decided that it was sufficient to exact one-fifth of the dower. It accordingly gave the plaintiff a decree for restitution of conjugal rights conditional on the payment of Rs. 1,000.¹

The defendant appealed to the High Court, again contending that in the absence of any stipulation that the dower was deferred, it should be considered prompt, and that under the circumstances the amount of dower awarded was too small. The plaintiff took certain objections under s. 348 of Act VIII of 1859, the first being that, as the defendant had not demanded her dower, the decree of the lower Appellate Court should not have been conditional on the payment of dower.

Mr. Conlan, the Junior Government Pleader (Babu Duraka Nath Banarji) and Mir Zahur Husain, for the Appellant.

[485] Mr. Mahmood and Maulvi Mehdi Hasan, for the Respondent.

The following Judgments were delivered by the High Court:—

Pearson, J.—The view that dower, when the payment of it has not been stipulated to be deferred, should be deemed to be payable on demand, appears to me to be most reasonable and most in accordance with the dictates of common sense; but although it is stated by Macnaghten to be the rule of the Muhammadan law, I am constrained to hold in concurrence with the lower Courts that the greater weight of authority is in favour of the doctrine set forth in Baillie's Digest, p. 126.¹ The inquiry into the custom with the view of determining the portion of the dower-debt payable promptly was therefore proper; and when the question could not be decided by reference to custom, it

* *Abdool Shukkoor v. Raheemooonissa*, H. C. R., N.-W. P., 1874, p. 94, instead of a conditional decree being given the suit was dismissed as unmaintainable.

¹ See also *Hatima Bibi v. Sudruddin*, 2 Bom. H. C. R., 307, where the law stated in Baillie's Digest was followed, on the other hand, see *Jumeela v. Mulleeka*, W. R., 1864, p. 252, where the law stated in Macnaghten's principles was followed; and *Tadiya v. Hosanebiyari*, 6 Mad. H. C. R., 9, where apparently the same law was followed.

was proper to determine it with reference to the status of the woman and the amount of the fixed dower. I see no reason to think that the lower Appellate Court has not exercised a sound discretion in awarding one-fifth of the total amount of that dower as the portion of which the appellant may fairly claim prompt payment..... I would disallow the objections taken by the respondent under s. 348 of the Procedure Code..... The first is also bad, for the circumstance that the appellant did not demand her dower before leaving the respondent's house does not preclude her from demanding it when restitution of conjugal rights is claimed; and the circumstance that they have already cohabited with consent since their marriage does not preclude her from refusing further cohabitation until the portion of her dower payable to her has been paid, see *Abdool Shukkoar v. Raheemoonissa* (H. C. R., N.-W., P. 1874, p. 94). The case is one governed by the Muhammadan law, and not by the general law of contract. The appeal should in my judgment be dismissed with costs.

Stuart, C.J.—The question of dower in this case arises under peculiar circumstances, and appears to demonstrate another anomaly in the Muhammadan law on this subject. The claim to dower is not [486] made directly by the wife, but by way of answer to a suit at the instance of her husband, the plaintiff, for restitution of his conjugal rights. She on the other hand, while admitting her intimacy with the plaintiff and that she lived in his house, denies that she was ever married to him, and although thus contending that she is not his wife, she nevertheless claims the rights of one. The Subordinate Judge finds as a fact (agreeing in this respect with the Munsif) that a marriage between the parties did take place. Any contract, however, between them as to dower is, from the very nature of the case, and especially having regard to the defendant's plea, necessarily excluded, and her claim to dower, therefore, must rest entirely on the Muhammadan law applicable to a woman in her position. She claims in the way explained Rs. 5,000, and that she is entitled to demand it as prompt dower, and to have it paid before she returns to the plaintiff's house. The plaintiff, the husband, admits the amount, but says that as there was no agreement as to the nature of it, it must be presumed to be deferred dower. It might be supposed reasonable that before a woman could put forward her claim to the dower at all, she ought in the first place to put herself in the right position for asking it by doing her duty as a wife by her husband, and by returning to cohabitation with him, especially as it cannot be said that she left his house because of his refusing her dower. But this reasonable and natural state of things does not appear to find a place in Muhammadan law, according to the principles of which system, on the contrary, a wife can refuse herself to her husband till her dower, being prompt, has been satisfied. But in the present case, although the amount is admitted, and, in the absence of proof to the contrary, must be regarded as prompt, yet the Subordinate Judge considers Rs. 5,000 to be excessive, basing the opinion apparently on his estimate of the defendant's character, whom he describes as a prostitute "belonging to a like family," and he considers that one-fifth of the amount claimed as prompt dower is sufficient. I am not disposed to quarrel with this conclusion, nor with his order as to costs. I would therefore dismiss the special appeal, and, as to costs of this Court, I would direct that both parties should bear their own.

Appeal dismissed.

NOTES.

[I. RESTITUTION OF CONJUGAL RIGHTS—PLEA OF NON-PAYMENT OF DOWER.—

This case was overruled in (1886) 8 All. 149 and the plea held unavailing:—(1886) 8 All. 149; (1888) 11 Mad. 327; (1890) 17 Cal. 670; (1905) 30 Bom. 122; (1912) 15 O. C. 127.

II. PORTION OF THE DOWER TREATED AS PROMPT.

On this point, this case was followed in (1877) 1 All. 506; (1911) 38 All. 201.]

[487] APPELLATE CIVIL.

The 10th April, 1877.

PRESENT :

SIR ROBERT STUART, K.T., CHIEF JUSTICE, AND MR. JUSTICE SPANKIE.

Nanak Ram.....Plaintiff

versus

Mehin Lal.....Defendant.*

Act IX of 1872 (Indian Contract Act), s. 127, illustration (c)—Surety-bond—Void Contract—Want of consideration.

Where *N* advanced money to *K* on a bond hypothecating *K*'s property, and mentioning *M* as surety for any balance that might remain due after realization of *K*'s property, *M* being no party to *K*'s bond but having signed a separate surety-bond two days subsequent to the advance of the money, *held* that the subsequent surety-bond was void for want of consideration under s. 127 of the Indian Contract Act (IX of 1872).

Per STUART, C. J.—The legal position of the surety considered and determined.

Per STUART, C. J.—Remarks on the legal character of the "illustrations" attached to Acts of the Indian Legislature, and opinion expressed that they form no part of these Acts.

THE plaintiff in the above case, Nanak Ram, advance to one Kalka Prasad a sum of money upon a bond dated 14th November 1872, which hypothecated certain property of Kalka Prasad as security for the repayment of the amount, and recited that the defendant in the present suit was surety for any balance of the debt which might remain unsatisfied after realization of the said property. The bond of 14th November 1872, although reciting therein that the defendant Mehin Lal was surety for the advance and repayment of the money, did not bear the said surety's signature, but two days later, *viz.*, on the 16th November 1872, Mehin Lal executed a separate surety-bond reciting the provisions of the bond of 14th November 1872, and undertaking the liability mentioned therein.

Nanak Ram filed a suit against Kalka Prasad and Mehin Lal in the year 1875 to recover the amount advanced on the bond dated 14th November 1872. Mehin Lal pleaded in answer to this suit that he was no party to the bond of 14th November 1872, and that having executed a separate surety-bond on the 16th November 1872, which was not referred to in the plaint, he could not be made liable on [488] the previous bond which was the basis of the existing suit. The Munsif of Chibramau on the 2nd December 1875, accordingly decreed the suit against the principal debtor, Kalka Prasad, and his property, but dismissed it as against Mehin Lal, the surety. This decision of the Munsif was, on appeal, upheld by the District Judge on the 15th March 1876, and became final. Thereafter Nanak Ram, the above plaintiff, filed a second suit (out of which the present special appeal arises) against Mehin Lal, the surety, on the bond dated 16th November 1872. The defendant, amongst other pleas in answer to the second suit, pleaded want of consideration for the subsequent surety-bond. The Munsif of Chibramau held that, under s. 127 of the Indian

* Special Appeal, No. 1897 of 1876, from a decree of Pandit Har Sahai, Subordinate Judge of Farukhabad, dated the 23rd August 1876, affirming a decree of Munshi Lalita Prasad, Munsif of Chibramau, dated the 20th May 1876.

Contract Act (IX of 1872), the contract of guarantee dated 16th November 1872, was void for want of consideration and dismissed the suit. The Subordinate Judge of the district, to whom the appeal from the Munsif's judgment was transferred by the District Judge, confirmed the Munsif's decree.

The plaintiff Nanak Ram filed a special appeal in the High Court impugning the decisions of the lower Courts, on the ground that the lower Courts had misconstrued the deed of the 16th November 1872, and that it was a valid instrument under the Indian Contract Act, having been executed on account of the bond debt, which was good consideration for the guarantee.

Munshi *Sukh Ram* and Shah *Asad Ali*, for Appellant.

Lala *Lalta Prasad*, for Respondent.

The following **Judgments** were delivered by the Court :--

Stuart, C. J.—This is a special appeal from Farukhabad in a suit against a surety in a bond transaction which was dismissed by the Munsif of Chirraimau in that district, his judgment having in regular appeal been confirmed by the Subordinate Judge. There had been a previous suit by the same plaintiff against his principal debtor and the same surety, in which a decree was made against the principal debtor alone, but which decree was not brought by appeal to this Court. The present suit, on the other hand, claims to enforce the surety's liability without showing that the previous decree against the principal debtor had been executed and was [489] unproductive of recovery to any extent and quite unavailing, and it is not easy to understand what could have been the real motives of the parties and their own true belief as to their relative position in the transaction, in all respects.

The present appeal is a disagreeable illustration of the crude, meagre, and unsatisfactory manner in which special appeals are, I regret to say, usually brought before us. The paper-books supplied to us, the Judges, in the present case contain nothing but the very loose although not erroneous judgments of the two lower Courts, the record itself is scanty of facts and of law, and at the hearing I failed to get any sufficient information from the pleaders on either side on the one question on which the whole case depends, *viz.*, the real position of the surety. For although this is a special appeal raising only, according to the theory of the procedure, a question of law, my difficulty was not a legal one, but simply a doubt as to a plain and simple matter of fact, *viz.*, whether Mehin Lal the surety in point of fact interposed in the transaction between Nanak Ram and Kalka Prasad the debtor for the benefit of the latter or otherwise. Under these circumstances, before disposing of the case, I thought it necessary to send for the record in the first suit between Nanak Ram and Kalka Prasad, and thus obtained some additional information. The case was also again put on the cause-list that the pleaders for the parties might have an opportunity, with this additional record before us, of throwing further light on the still somewhat obscure position of the surety, but with little success, the pleaders for the defendant, respondent, verbally and simply contending that Mehin Lal was the surety for the benefit of the plaintiff, and that, therefore, his surety-bond had been without consideration, while the pleader for the appellant unintelligibly suggested that he was really the surety for both parties, and that as the friend of both he had come forward to remove any dissatisfaction on the part of the lender, who had in the meantime parted with his money, and that that was a state of things which could not but be agreeable to the borrower. The case was thus left for our judgment in a condition far from

satisfactory, and I am not sure that I yet quite understand the real truth of the matter, but it would, I am convinced, be idle to attempt any further investigation of the facts by a remand or otherwise.

[490] From all the materials now before us, the facts would appear to be these. One Kalka Prasad borrowed and received the sum of Rs. 95 from the plaintiff Nanak Ram, and gave a bond for the same, the material parts of which are as follows :—

"I, Kalka Prasad, son of &c., do hereby declare that I have borrowed Rs. 95 of the Queen's coin, half of which is Rs. 47-8-0, from Nanak Ram, son of &c., Mehin Lal, son of &c., being my surety, that I hereby promise that the said money together with interest at two per cent. per mensem shall be paid up in the course of three years without any objection whatever; that until the money is paid one kachha house and a field, No. 489, called Barnawala, measuring 20 bighas kham, and situated in Harballahpur, also called Uddhanpur, in pargana Chirbamau, the boundaries of which are noted at foot, and also four bullocks, one of which is dark blue and the other three white coloured, and two she-buffaloes of black colour, all of which belong to me, shall remain hypothecated in this bond, and that I shall not be competent to sell or mortgage or give them in gift to any one."

As to the surety, although he did not sign this bond, it purported to determine his liability as follows :—

"I, Mehin Lal, surety, do hereby declare that if the money due to the creditor should not be recovered from the property of Kalka Prasad, the principal party who borrowed the money, I, the surety, shall pay the money out of my pocket to the creditor."

This bond was duly executed by Kalka Prasad the borrower and is dated the 14th November 1872, and duly registered, it having been presented for registration by him alone, but as I have stated it was not signed by the surety. But Nanak Ram the lender, or according to the theory of the plaintiff's pleader, both parties, the lender as well as the borrower, being content to leave things in the position just described, Mehin Lal the surety again came forward with a new guarantee or surety-bond in his own name alone, and that document is in the following terms :—

"I, Mehin Lal, surety, son of &c., do hereby declare that whereas a bond for Rs. 95 has been executed on the 14th November 1872 by Kalka Prasad, son of &c., agreeing to repay within three years with interest at two per cent. per mensem in favour of Nanak Ram, son of &c., but that the said Nanak Ram notwithstanding the hypothecation of the property of Kalka Prasad in the said bond is not fully satisfied, I, the surety for Kalka Prasad, therefore, agree and give it in writing that if Nanak Ram fails to recover the amount of the bond with interest from the property of Kalka Prasad, the principal debtor, I, the surety, shall pay from my own pocket the amount of the bond executed by Kalka Prasad with interest entered therein to Nanak Ram. I have therefore executed these few presents by way of a security-bond to be a document."

[491] This instrument was duly executed by Mehin Lal and it is dated the 16th November 1872, that is two days after the execution of the first bond by Kalka Prasad the borrower, and it is admitted to be a contract of guarantee within the meaning of s. 126 of the Contract Act. Such being the state of the transaction in November 1872, the plaintiff appears to have waited till the three years had expired and then to have resolved on taking proceedings for the recovery of his money. It is, however, difficult to understand the course he adopted. He brought a suit, the first suit, against his debtor and the surety, but claiming therein solely on the basis of the first bond which had not been signed by the surety, and passing by the additional guarantee which had been

these instruments was examined as a witness, and the gloss suggested by his evidence is somewhat different from, if it does not go to contradict the terms in which he wrote the bonds. He says that the money was paid into the hands of Mehin Lal and was by him delivered to Kalka Prasad, and that afterwards both parties came to him and asked him to write the second document, the meaning of which appears to me to be that notwithstanding the phraseology of the two deeds, Mehin Lal was not only the mere go-between, but the actual messenger and representative of Nanak Ram in the business. He, Mehin Lal, therefore, cannot be regarded as having been surety for the benefit of the principal debtor but really for the satisfaction and benefit of Nanak Ram the lender. His suretyship, therefore, was without consideration, and in fact a mere *nudum pactum*.

[495] I must not conclude this judgment without offering a few remarks on a subject which has been much dwelt upon in this case. I allude to those "illustrations" which the Government of India in its Legislative capacity have thought fit of late years, and no doubt with the best and most considerate motives, to add to its Legislative enactments. These illustrations, although attached to, do not in legal strictness form part of, the Acts, and are not absolutely binding on the Courts. They merely go to show the intention of the framers of the Acts, and in that and in other respects they may be useful, provided they are correct. In this country, where the administration of the law is for the most part conducted by persons who are not only not professional lawyers, but who have had no legal education or training in any proper or rational sense of the term, the Legislature acts with wisdom and salutary consideration for the interests of justice by putting into the hands of judicial officers appliances such as the illustrations in question for their guidance and direction in the performance of their duties. But, for myself, I can truly say I have never experienced their utility, and I fear they sometimes mislead, and I observe they are more regarded in the Subordinate Courts in these provinces, and even by the pleaders of this High Court, than is the paramount language of the Act itself, of which, however, as I have remarked, they, strictly speaking, form no part. With respect to the present case, plainer language than that used in s. 127 of the Contract Act it would be difficult to imagine, and why it should have been thought proper to illustrate it at all I do not very well comprehend. Appended, however, to s. 127, are three illustrations (a), (b), and (c); and illustration (c) is as follows:—"A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void." This illustration appears to have received much more attention in the lower Courts than s. 127 itself. In fact, the lower Appellate Court goes entirely upon it, and at the hearing of this appeal it was almost entirely relied on, notwithstanding repeated attempts on my part to point out that it was the meaning of s. 127 itself and not the illustration that was material. The illustrations (a) and (b) appear to be correct enough, although I do not think they were wanted for the elucidation of the section, but this illustration (c) is so vague and bald as to be open to [496] misapprehension. Brevity and succinctness are no doubt very desirable qualities in the expression of a law, but they do not necessarily argue distinctness, and in my experience I know of nothing more dangerous than unnecessary brevity in the statement of a proposition in the law of contracts. Now, this illustration (c), as it stands, may be either good or bad law, if it means that the party C without any privity, and in fact merely as a volunteer, agreed to pay for the goods in default of B, and no other act or fact in the way of consideration appearing, then no doubt the agreement would be void, and the illustration would be right. But it does not of itself show that. It assumes the absence of consideration, without any definition of the term other than that given in s. 127

itself, and so far it is calculated to mislead. To be of real service to those for whose assistance these illustrations are intended, they ought to be pellucidly clear in their phraseology and, if possible, I had almost said infallibly sound in their law. But for the purposes of the High Courts of this country these illustrations are not only not required in any sense, but they are frequently the cause of embarrassment, and I would infinitely prefer to have the bare and simple language of the Act itself, without any appendages of the kind. I am afraid, too, that they are open to the objection of being opposed to the canons of construction which prevail in the English Courts for the interpretation of statutes. Thus it has been ruled in England that "the intention of the legislature must be ascertained from the words of a statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute"—*Fordyce v. Bridges* (1 H. L. Cas. 1 ; s.c. 11 Jur. 157) ; and "the Court knows nothing of the intention of an Act, except from the words in which it is expressed applied to the facts existing at the time"—*Logan v. Courtown (Earl)* (13 Beav. 22 ; s.c., 20 L. J. Chanc. 347) ; "the language of a statute taken in its plain ordinary sense, and not its policy or supposed intention, is the safer guide in construing the enactments"—*Philpott v. St. George's Hospital* (6 H. L. Cas, 338 ; s. c. 3 Jur. N. S. 1269).

In the present case it is satisfactory to know that any ambiguity that this illustration (c) may fairly, or unfairly, be considered to be characterised by, has not prevented us from applying the [497] plain language and the very clear meaning of s. 127 of the Contract Act, and we now do that by dismissing the present special appeal with costs.

Spankie, J.—Both parties admit that the instrument on which the suit is based is a contract of guarantee as defined in s. 126² of the Indian Contract Act of 1872. The first plea will not hold, as it has been found that the money was not advanced to the obligor of the bond executed two days before the guarantee on the strength of such contract of guarantee. Both instruments (and this circumstance disposes of the second plea) show that there was no consideration in respect of the contract of guarantee. The creditor did not promise to do anything, and did not do anything, for the benefit of the principal debtor, whereby there was a consideration for the surety's giving the guarantee. It is clear that two days after the bond has been executed, and the money advanced to the principal debtor, the creditor, feeling anxious about the sufficiency of the security, took the contract of guarantee from the surety. In this deed the surety simply promises to make good any deficiency if the property hypothecated by the obligor of the bond does not satisfy the debt. But the creditor agreed to do nothing, and promised nothing, in return. I, therefore, think that the suit could not be maintained, and hold that the decision of the lower Appellate Court should be affirmed.

Decree affirmed and suit dismissed.

NOTES.

I. SURETYSHP.—

See the remarks on this case of Messrs. Pollock and Mulla, 3rd Edition (1913), p. 455.

II. VALUE OF ILLUSTRATIONS IN ENACTMENTS.—

See also (1897) 20 Mad. 481; (1907) 34 Cal. 941, at 950 6 C. L. J. 237-11 C. W. N. 959.]

Contract of "guarantee," "surety," "principal debtor," and "creditor." [Sec. 126 :—A contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the surety, the person in respect of whose default the guarantee is given is called the principal debtor, and the person to whom the guarantee is given is called the creditor. A guarantee may be either oral or written.]

[1 All. 497]

CRIMINAL JURISDICTION.

The 9th November, 1877.

PRESENT:

MR. JUSTICE TURNER AND MR. JUSTICE SPANKIE.

Empress of India
versus
Abul Hasan.

Act XLV of 1860 (Penal Code), s. 211—False charge.

To constitute the offence of making a false charge, under s. 211 of the Indian Penal Code, it is enough that the false charge is made though no prosecution is instituted thereon. *The Queen v. Subbanna Gaundan* (1 Mad. H. C. R., 30) followed. *The Queen v. Bishoo Barik* (16 W. R. Cr., 77) distinguished.

THIS was an appeal to the High Court by the Local Government against a judgment of acquittal passed by G. E. Watson, Esq., [498] Sessions Judge of Aligarh, dated the 26th July 1877, which reversed a judgment of conviction passed by J. B. Fuller, Esq., Assistant Magistrate of the first class, dated the 3rd July 1877.

The facts of the case are sufficiently stated in the judgment of the High Court.

The Junior Government Pleader (Babu Dwarka Nath Banarsi) for the Local Government, Appellant.

Mr. L. Dillon for the Respondent.

The High Court delivered the following

Judgment:—In this case Abul Hasan went to the Police-station and accused Ser Mal of having stolen certain surgical instruments from the dispensary at Atrauli. This complaint was made with the intention that it should be reported to the Magistrate and that thereon proceedings should be taken against Ser Mal. At the suggestion of Abul Hasan, the Police immediately searched the premises occupied by Ser Mal, and there found, in a place which could be readily reached from the outside of the house, the articles alleged to have been stolen. The Police, finding that Abul Hasan had recently a quarrel with Ser Mal about the non-payment of some fees for medical attendance, and seeing that the articles were placed in a spot unlikely to have been selected by the owner of the premises, but in which they might have been deposited by any person outside the house without attracting the attention of the inmates, in forwarding a report to the Magistrate intimated that the charge made was false. The Magistrate, after making a second inquiry through the tahsildar, came to the same conclusion and refrained from instituting any proceedings against Ser Mal. Abul Hasan was, however, summoned to answer the charge of having instituted a false complaint of a criminal offence, and on this charge he was convicted. On appeal, the Judge acquitted him, holding that the charge of false complaint could not be sustained because the Magistrate had not inquired into the charge of theft, and in support of his judgment the Judge relied on the ruling of a Bench of the High Court, Calcutta—*The Queen v. Bishoo Barik* (16 W. R. Cr., 77). We may point out that in that case proceedings on the original

charge were actually pending when the charge of false complaint was instituted and determined, whereas in the case before us no proceedings were pending on the [499] original charge when proceedings were instituted against Abul Hasan. Whether it would be a sufficient answer to a charge of false complaint that the complaint had not been determined and that proceedings were still pending, we need not now determine, for in this case no proceedings had been instituted. The offence consists not in the prosecution of a false complaint but in the making of it. The case of *The Queen v. Subbanna Gaundan* (1 Mad. H. C. R., 30) is precisely in point. We concur in the ruling of Chief Justice SCOTLAND in that case and in the grounds on which that ruling proceeds. The ground, therefore, on which the judgment of the Sessions Judge proceeds is bad in law. The evidence adduced by the prosecution satisfies us that the original charge was made and that it was false, and warrants the inference that Abul Hasan knew it was false, and made it with the intention of injuring Ser Mal. The conviction was therefore proper, and the sentence is certainly not too severe. The appeal is allowed, the judgment of acquittal passed by the Sessions Judge is set aside, and the conviction and sentence affirmed.

NOTES.

[See also the following cases:—1 All. 527; 4 All. 182; 22 Bom. 596; 6 Cal. 482, 496; 14 Cal. 707.]

[1 All. 499]

APPELLATE CIVIL.

The 14th November, 1877.

PRESENT:

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR. JUSTICE TURNER.

Dirgaj Singh and others.....Plaintiffs
versus
 Debi Singh and another.....Defendants.*

Conditional Sale—Mortgage—Foreclosure—Regulation XVII of 1806, s. 8.

Where land which has been conditionally sold is subsequently mortgaged, the second mortgagee, being the mortgagor's "legal representative," within the meaning of that term in s. 8 of Regulation XVII of 1806, is entitled on foreclosure proceedings being taken by the conditional vendee to the notice required by that section, and cannot be deprived by the conditional vendee of the possession of the land notwithstanding foreclosure, where no such notice has been given to him.

THIS was a suit for possession of a share in the village of Khushalpur and of a share in the village of Jithupur. These shares had been conditionally sold to the plaintiffs in 1864 by Gurdhan Singh, the proprietor, defendant in this suit. In 1870 they were mortgaged by him to Debi Singh, also a defendant in this suit. The mortgage to the plaintiffs having been [500] foreclosed, they brought the present suit for possession of the shares. The Munsif gave the plaintiffs a decree, holding that the mortgage to Debi Singh was not a genuine mortgage but made to defraud the plaintiffs of their rights under the conditional sale. Debi Singh appealed to the Subordinate Judge, who reversed the decree of the

* Special Appeal, No. 441 of 1877, from a decree of Maulvi Sultan Hasan Khan, Subordinate Judge of Gorakhpur, dated the 3rd February 1877, reversing a decree of Maulvi Muhammad Kamil, Munsif of Basti, dated the 9th December 1876.

Munsif, and dismissed the suit as brought, on the ground that the plaintiffs could not obtain possession of the shares without redeeming the mortgage to Debi Singh, which he held was a genuine mortgage.

The plaintiffs appealed to the High Court contending that they were entitled to take the shares free of incumbrance, and that the respondents, having failed to redeem them within the time allowed by law, had lost all right or interest in them.

The Senior Government Pleader (*Lala Juala Prasad*) for the Appellants.

Munshis *Hanuman Prasad* and *Sukh Ram* for the Respondents.

The High Court made the following

ORDER OF REMAND : - The pleas set out in the memorandum of appeal show valid grounds of objection to the decree of the lower Appellate Court. The appellants' deed of conditional sale was executed in 1864, the respondents' deed of mortgage in 1870. Now the mortgagor could only convey to the respondent such a title as he himself had, namely, a title subject to the conditional sale and the legal consequences of the sale. Consequently the appellants were entitled to take proceedings for foreclosure without discharging the alleged mortgage-debt due to the respondent. Such proceedings have been taken, but the respondent now alleges that he had no notice of them. If the mortgage made to the respondent was merely colourable and the original mortgagor remained solely interested in the property subject of course to the conditional sale, this notice to the respondent was not necessary, but if the mortgage made to the respondent did in fact create an interest in the property in his favour he was entitled to notice, and it must be ascertained whether he received such notice. The lower Appellate Court must try the following issues : - Had the respondent at the time the foreclosure proceedings were commenced a *bond fide* interest [501] in the property ? If so, was notice of foreclosure served on him ? The lower Appellate Court will return its finding on these issues, when ten days will be allowed for objections.

The Subordinate Judge determined on these issues that at the time the foreclosure proceedings commenced Debi Singh was in possession of the shares as mortgagée, and was still in possession as such, and that no notice of foreclosure was served on him.

On the return of these findings, the High Court delivered the following

Judgment : - The facts found by the Court below are no longer disputed, and we accept the findings. We entirely concur in the more recent rulings (*see 3 W. R. 230, per PEAR, J., so 6 W. R. 230*) that the term mortgagor's " legal representative " used in the Regulation (XVII of 1806) was intended to apply to all or any persons who at the date of the notice possess a title to the equity of redemption whether absolute or defeasible under the mortgage. The respondents were as mortgagees entitled to notice, and the foreclosure proceedings as against them are invalid. They were entitled to have the opportunity of coming in to redeem the mortgage held by the appellants so as to preserve their own security, and the issue of notice to them was indispensable to bar them by foreclosure. The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[This case was followed in (1906) 2 N. L. R. 118.]

[1 ALL. 501]

APPELLATE CIVIL.

The 14th November, 1877.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR. JUSTICE TURNER.

Ajnasi Kuar.....Judgment-debtor

versus

Suraj Frasad.....Decree-holder.

*Decree for the performance of a particular act—Execution of decree—
Act VIII of 1859 (Civil Procedure Code), s. 200.*

A, who had been directed by a decree to refrain from preventing her daughter returning to her husband, after the date of the decree permitted her daughter, who was of age, to reside in her house. Held that such conduct on the part of *A* was no such evidence of interference with her daughter's return as would justify the execution of the decree against her, under the provisions of s. 200 of Act VIII of 1859.

[502] THE decree-holder in this case applied for the execution of a decree of the Munsif dated the 25th May 1874, which he had obtained against his wife Deo Kuar for restitution of conjugal rights and against his wife's mother, Ajnasi Kuar, directing her to refrain from preventing his wife returning to him. He prayed in his application for execution that his wife should be sent back to him from the house of Ajnasi Kuar, and in the event of this not being done that certain property belonging to the judgment-debtors should be attached, and that the judgment-debtors should be arrested and imprisoned under s. 200 of Act VIII of 1859.

Ajnasi Kuar objected to the execution of the decree against her, stating that it was her wish that Deo Kuar should live with her husband, but that Deo Kuar was desirous of living in some house near her house, and that her servants should attend on her (Deo Kuar) in order that she might not be harshly treated by her husband, and that if the decree-holder would consent to this arrangement she (Ajnasi Kuar) would give him and his wife food and clothing and provide servants for them, or the matter might be submitted to arbitration.

The Munsif directed execution to issue, observing with reference to Ajnasi Kuar that she did not give her unqualified assent to her daughter living with her husband, and therefore it could not be held that she had not opposed her daughter's return to her husband. On appeal by Ajnasi Kuar to the Judge, the order of the Munsif was affirmed.

Ajnasi Kuar appealed to the High Court contending that she did not prevent Deo Kuar, who was of age, returning to her husband, and that it was not shown that she in any way obstructed the satisfaction of the decree.

Mr. Mahmood and Munshi Hanuman Prasad, for the Appellant.

*Miscellaneous Special Appeal, No. 46 of 1877, from an order of M. Brodhurst, Esq., Judge of Benares, dated the 8th June 1877, affirming an order of Babu Promoda Charn Banarji, Munsif of Benares, dated the 17th May 1877.

Mr. Colvin for the Respondent.

The Judgment of the High Court was delivered by

Turner, J.—There is no evidence that there has been any interference on the part of the appellant with the return of her daughter to the respondent since the date of the decree. Something [503] more must, we think, be shown than that the daughter who is of age is still permitted to reside in the appellant's house. We must therefore allow the appeal and order the release from attachment of the appellant's property. No costs will be allowed to either party to this appeal either in the Court below or in this Court.

Appeal allowed.

NOTES.

[See the C. P. C., 1908, O. 21, r. 33.]

[1 All. 503]

APPELLATE CIVIL.

The 19th November, 1877.

PRESENT :

MR. JUSTICE PEARSON AND MR. JUSTICE OLDFIELD.

Prag Das.....Plaintiff

versus

Hari Kishn and another.....Defendants.*

Hindu Law—Hindu widow—Forfeiture—Reversioner.

A Hindu widow does not forfeit her interest in her deceased husband's separate estate merely by divesting herself of such interest. Such an act does not entitle the person claiming to be the next reversioner to sue for possession of the estate, or for a declaration of his right as such reversioner to succeed to the estate after the widow's death.

THIS was a suit for possession of a moiety of the separate estate of one Lalji, deceased, brought by one of the two next reversioners, against the widow of Lalji and the other reversioner. The facts of the case are sufficiently stated in the judgment of the High Court to which the plaintiff appealed against the decree of the Court of First Instance dismissing his suit.

The Junior Government Pleader (Babu Dwarka Nath Banerji) and Munshi Hanuman Prasad for the Appellant.

Pandit Ajudhia Nath and Munshi Sukh Ram for the Respondents.

The Judgment of the High Court was delivered by

Oldfield, J.—Ram Din, who died in 1872, left three sons surviving him, Lalji, Prag Das, and Hari Kishn. The first died in September 1874, leaving a childless widow, Gopal Dai. The subject of this suit is the property left by Lalji. The plaintiff, Prag Das, sues his surviving brother Hari Kishn and

* Regular Appeal, No. 48 of 1877, from a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Mirzapur, dated the 8th December 1876.

Gopal Dai, the widow, to establish his right and to recover possession of half Lalji's property, on the averment that the three brothers held separate [504] property, and that the widow had colluded with Hari Kishn and allowed him to take possession in his own right of all the property of the deceased by which act she had forfeited her interest. Hari Kishn pleaded that he is the heir of the deceased, as deceased and he had lived in union. He allows that a partition had taken place at their father's death, but it was only plaintiff's share which was divided off, and the widow supports him in his allegation that he and deceased had lived in union, and avers that no alteration has taken place in the nature of the possession exercised on the property since Lalji's death, and adds that Hari Kishn's son was considered to be his heir by deceased, but she makes no specific mention of any title as heir by adoption to deceased. The Subordinate Judge found that the deceased held a separate estate and that in consequence his widow, Gopal Dai, is his heir, and that no act has been shown on her part to divest her of the estate and give plaintiff, the reversioner, immediate possession. It appears that at the death of Lalji there were disputes as to the succession, and Hari Kishn obtained mutation of names of the whole estate in his favour and possession also, but the Subordinate Judge seems to think that he had only formal possession, that there has been nothing done by the widow injurious to his reversionary interest, and that this is not the time to decide on any right in future to which the plaintiff may become entitled, and he dismisses the suit.

The pleas in appeal on the plaintiff's part amount to this, that on the facts proved the plaintiff is entitled to a decree for the whole claim, and at any rate that his reversionary right in the property should have been protected by giving him a declaration of it, and by restraining the defendant from dealing with the property in a manner injurious to the plaintiff's title.

The respondents have filed objections under s. 348 to the finding that the deceased held a separate estate. It will be convenient first to dispose of their objections, and on this point we agree with the Subordinate Judge. There is ample evidence that the shares of all three brothers were separated from each other after their father's death. The evidence alluded to by the Subordinate Judge appears to us conclusive on the point. There are admissions by the brothers of division, proceedings such as mutation of names in the revenue records only consistent with the fact that such division [505] had taken place, and separate bankers' accounts, and separate dealings with the property, all pointing to a division of Lalji's estate from both his brothers. On the other side all that the respondents' evidence necessarily shows is commensality between Lalji and Hari Kishn; while some of their witnesses admit ignorance as to their monetary transactions. There is no doubt that there was a partition effected at Ram Din's death, and there is no evidence of any re-union, nor indeed is re-union alleged.

With reference to the plaintiff's appeal, looking to the facts and allegations of the respondents, it seems clear that Hari Kishn asserted his own title as heir of Lalji, and that he was supported in doing so by the widow, who recognized him as the heir, and that he has obtained possession of the estate; and it does not appear that this is a mere formal possession but one which has given him the exercise of all the rights of an owner. Anything short of this is opposed to the allegations of the widow, who distinctly states in her written statement that Hari Kishn is in undivided possession of all the property in the same manner as he was in conjunction with her husband, and that there has been no change or alteration whatever since her husband's death; all this amounts to a possession as owner and one that would count adversely to the widow.

However, accepting such to be the case, the act of the widow divesting herself of her interest in the estate in favour of Hari Kishn will not operate as a forfeiture, so as to bring in the reversionary heirs. Hari Kishn's possession cannot on this ground be interfered with while she lives, and no other ground for interference has been alleged or made out, and therefore the claim fails and has been properly dismissed, for it is one asking for a declaration of a present right and possession in the property, nor can the Court declare that plaintiff will have a right of succession after the widow's death, but we may say that any reversionary rights which he may hereafter succeed in establishing are not affected by the widow's divesting herself of her interest in Hari Kishn's favour. We affirm the decree of the lower Court and dismiss the appeal. Each party will pay their own costs of this appeal.

Appeal dismissed.

NOTES.

[See the Judgment of BHASHYAM AYYANGAR, J., in (1902) 26 Mad. 143, where the effect of alienation by a Hindu widow is fully discussed.]

[506] APPELLATE CIVIL.

The 21st November, 1877.

PRESENT :

MR. JUSTICE PEARSON AND MR. JUSTICE OLDFIELD.

Taufik-un-Nissa.....Plaintiff

versus

Ghulam Kambar.....Defendant.*

Muhammadan Law—Dower.

Under Muhammadan law, when on marriage it is not specified whether a wife's dower is prompt or deferred, the nature of the dower is not to be determined with reference to custom, but a portion of it must be considered prompt. The amount to be considered prompt must be determined with reference to the position of the wife and the amount of the dower, what is customary being at the same time taken into consideration. *Kidan v. Mazhar Husain* (I. L. R., 1 All. p. 483) followed.

THIS was a suit to recover Rs. 25,000 out of Rs. 51,000 due to the plaintiff as dower, the suit being based on Muhammadan law. The plaintiff stated in her plaint that according to that law her dower must be considered prompt, because at the time of marriage it was not specified that the dower was deferred dower. The defendant alleged that for that reason it could not, under Muhammadan law, be considered prompt, that, under that law, where it was not specified whether dower was prompt or deferred, it was necessary to refer to custom to determine whether it should be considered prompt or deferred, and that according to the custom obtaining in such a case in Budaun, where the parties to the suit resided, the dower must be considered deferred dower. The Court of First Instance held that, in the absence of any specification whether the dower was prompt or deferred, it was necessary to refer to custom to determine the

* Regular Appeal, No. 44 of 1877, from a decree of Maulvi Abdul Majid Khan, Subordinate Judge of Shahjahanpur, dated the 1st September 1876.

nature of the dower, and that, according to the custom obtaining in such cases in Budaun, the dower must be considered deferred dower, and dismissed the plaintiff's suit.

The plaintiff appealed to the High Court contending that, under Muhammadan law, where at the time of marriage it was not specified whether dower was prompt or deferred, it must be considered prompt, that the custom on which the lower Court relied was opposed to this law and could not therefore be recognized, and that such custom was not proved by the evidence on record.

Mr. Mahmood and Maulvi Obeidul Rahman, for the Appellant.

[507] *Munshi Hanuman Prasad and Shah Asad Ali*, for the Respondent.

The Judgment of the High Court was delivered by

Oldfield, J.—This is a claim to recover Rs. 25,000 as prompt dower. It is not disputed that the amount of dower stipulated for at marriage was Rs. 51,000, and it is admitted that it was not specified at the time whether the dower was prompt or deferred. The plaintiff contends that, under such circumstances, the entire amount is exigible as prompt dower on demand, though she only claims in this suit a portion. The defendant contends that in such a case the custom of the place should be referred to, and by the custom of Budaun the entire dower is to be considered as deferred. The lower Court has dismissed the claim, with reference to what it holds to be the custom. It considers that when there has been no specification of dower, the law requires that a reference should be made to custom to determine not only the proportion of the dower which shall be considered to be prompt, but whether any at all shall be so considered, and it holds that in Budaun it is the custom to consider the whole as deferred. This judgment cannot be supported. The law on the point is that stated in Baillie's Digest from the *Fatawa Kazee Khan*, which has been followed by this Court in recent decisions—*Eidan v. Mazhar Husain* (I. L. R. 1 All., p. 483); *Habib-un-Nissa v. Nizam-ul-din*, decided the 31st July 1877 (unreported). When nothing has been said as to the character of dower, the Court may determine the amount to be considered prompt with reference to the position of the woman and the amount of the dower named in the contract, taking into consideration at the same time what is customary. The reference to custom appears to be in respect of the proportion to be held as prompt, and it does not appear to have been contemplated to refer to custom to decide whether or not the entire dower should be deferred. We have been shown a translation of an extract from *Jami-ur-Rumuz*, a commentary on *Mukhtasar Vakaya*, which will, however, bear another construction. However this may be, we do not concur with the Subordinate Judge in holding that any custom is proved by which the entire dower is considered deferred. (After considering the evidence as to the custom the judgment proceeded [508] as follows) :—We hold that neither by law or custom is the plaintiff debarred from obtaining prompt dower, and we consider Rs. 17,000, or one-third of the total dower, a reasonable sum to award. We reverse the decree of the lower Court and decree accordingly with all costs.

Appeal allowed.

NOTES.

[See 1 All. 488 and (1911) 33 All. 291.]

[1 ALL. 509]

APPELLATE CIVIL.

The 22nd November, 1877.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND
MR. JUSTICE OLDFIELD.

Imam Ali and others.....Decree-holders
versus
 Dasaundhi Ram.....Judgment-debtor.*

*Execution of decree—Special appeal—"Final decree of Appellate Court"—
 Limitation—Act IX of 1871 (Indian Limitation Act), sch. ii, art. 167.*

The Munsif gave the plaintiffs in a suit for possession of land and for mesne profits a decree for possession but dismissed the claim for mesne profits. An appeal was preferred to the Judge, who affirmed the decree for possession and remanded the case to the Munsif, under s. 351 of Act VIII of 1859, to determine the mesne profits due to the plaintiffs. The Munsif gave the plaintiffs a decree for certain mesne profits. Subsequently a special appeal was preferred to the High Court against the Judge's decree. While this was pending an appeal was preferred to the Judge against the decree of the Munsif for mesne profits, and on the 7th June 1873, the plaintiff again obtained a decree for mesne profits. Finally, on the 6th March 1874, the High Court modified the Judge's decree for possession but did not interfere with the order of remand. *Held*, on the plaintiffs applying for execution of the Judge's decree, dated the 7th June 1873, that the limitation for the execution of such decree ran not from the date of such decree but from the date of the High Court's decree, which was "The final decree of the Appellate Court," and the only "final decree," within the meaning of art. 167, sch. ii of Act IX of 1871.

THIS was an application for the execution of a decree of a District Court, dated the 7th June 1873. The facts of the case are sufficiently stated in the judgment of the High Court to which the decree-holders appealed against the order of the Judge, affirming the order of the Munsif, which decided that execution of the decree was barred by limitation.

The decree-holders appealed to the High Court on the ground that limitation began to run from the date of the decree of the High [509] Court, dated the 6th March 1874, and not from the date of the decree of which execution was sought.

Babu Barodha Prasad, for the Appellants.

Munshi Hanuman Prasad, for the Respondent.

The High Court delivered the following

Judgment:—The question before us is whether the appellant's decree is incapable of execution by limitation. He sued in the Munsif's Court for possession of certain land and to recover damages. The Munsif decreed possession but dismissed the claim for damages. An appeal was preferred to the Judge, who (28th February 1873), affirmed the decree giving possession and remanded the case, under s. 351 of Act VIII of 1859, for adjudication as to the

* Miscellaneous Special Appeal, No. 62 of 1877, from an order of H. M. Chase, Esq., Judge of Saharanpur, dated the 18th May 1877, affirming an order of Maulvi Muhammad Imdad Ali, Munsif of Saharanpur, dated the 24th March 1877.

amount of damages due. An appeal was preferred from the Judge's decision to the High Court on the 23rd May 1873, and was pending till 6th March 1874, when the decision as to possession was modified and the Court did not interfere with the order of remand made by the Judge. In the meantime the Munsif on the 25th April 1873, decreed damages, and an appeal was preferred to the Judge who decided it on the 7th June 1873. It will be seen that the Judge's order is prior to the date of the High Court's decision in the appeal before them. Appellant now takes out execution of the Judge's decree of the 7th June 1873. If the three years' limitation is to run from the former date, the application is barred, and this is the view taken by the lower Courts. But this view is erroneous. Where there has been an appeal, the limitation will run from the date of the final decree of the Appellate Court. We hold this to be the decree of the High Court and not that of the Judge, the 7th June 1873; the former was passed after the Judge's decree of the 7th June 1873, and must be held to be the final decree of the Appellate Court and to have finally determined the entire claim. The lower Courts seem to consider that there may be several final decrees of an Appellate Court in one and the same case, giving separate periods of limitation for separate portions of a claim in one and the same suit, and they refer to the High Court's decree as final on the point of possession and so affording a period of limitation for that portion, and the Judge's decree as final on the point of damages and [510] affording another period of limitation for that portion of the claim, but this view is erroneous, both decrees cannot be final within the meaning of the limitation law. We reverse the order of the lower Court and remand the case for execution in due course. Costs to abide the result.

Cause remanded.

NOTES.

[See the comments of Mitra in his Limitation, Vol. II (1911), p. 1269.]

[1 All. 510]

APPELLATE CIVIL.

The 22nd November, 1877.

PRESENT:

MR. JUSTICE PEARSON, AND MR. JUSTICE TURNER.

Lachman Bibi and another.....Decree-holders
versus

Patni Ram and another.....Judgment-debtors.*

Decree made in favour of a firm in name of agent—Applications for execution made by agent other than agent named in the decree—

Effect of such applications to keep the decree in force—

Limitation—Act IX of 1871 (Indian Limitation Act), sch. ii, art. 167.

A decree was passed in favour of a firm in the name of an agent of the firm. The second and subsequent applications for execution were made by an agent of the firm other than the

* Miscellaneous Special Appeal, No. 66 of 1877, from an order of J. W. Power, Esq., Judge of Ghazipur, dated the 4th August 1877, reversing an order of Maulvi Zain-ul-Abdin, Subordinate Judge of Ghazipur, dated the 3rd July 1877.

agent named in the decree. Certain persons, alleging that they were the proprietors of the firm, applied for execution of the decree. The application was refused on the ground that the proceedings in execution taken by the last-mentioned agent were invalid, and execution of the decree was therefore barred by limitation. Held that such proceedings, however irregular, were not invalid.

THIS was an application for execution of a money-decree dated the 10th May 1870. This decree was passed *ex parte* in the name of Kishn Lal, described as the agent of the firm of Megh Raj Harbilas. On the date it was passed application for execution was made by Kishn Lal. A second application was made on the 8th December 1871, by one Mohan Lal, who had succeeded Kishn Lal as agent of the firm of Megh Raj Harbilas. A third and fourth was made by the same person on the 30th May 1872, and the 13th April 1875, respectively. The present application was made on the 15th February 1877, by Lachman Bibi and Katu Bibi alleging themselves to be the proprietors of the firm of Megh Raj and Harbilas the decree-holders. The judgment-debtors objected to the execution of the decree on the ground, among other grounds, that the former applications for execution made by Mohan [511] Lal were insufficient to keep the decree in force, as he was not the decree-holder, and execution of the decree was therefore barred by limitation. The Subordinate Judge disallowed this objection. On appeal by the judgment-debtors it was allowed by the Judge, who observed as follows: "The application made to the Court on the 8th December 1871 was not made by the decree-holder then on the record, *viz.*, Kishn Lal, but by another person. It was therefore not a petition to execute the decree, and, as all the other applications for execution were made by persons other than the decree-holder, execution of the decree must be considered barred."

Lachman Bibi and Katu Bibi appealed to the High Court, contending that the Judge erred in holding that Kishn Lal was himself the decree-holder, that the decree itself showed that it belonged to the firm of which the appellants were proprietors, that proceedings in execution of the decree were taken by the appellants from time to time in the name of their agent for the time being, and there was no reason in law why they should not take out execution and execution was not barred by limitation.

Munshi *Hanuman Prasad*, for the Appellant.

The Senior Government Pleader (*Lala Juala Prasad*) and Pandit *Bishambhar Nath*, for the Respondent.

The Judgment of the High Court was delivered by

Turner, J.—Owing to an error in procedure the decree was passed in the name of Kishn Lal, described as the agent of the firm of Megh Raj Harbilas, but it was then, as on subsequent occasions and is now, admitted that it was passed in favour of the firm of which the appellants assert they are and were the owners. The second and subsequent applications for execution, with the exception of the one now before the Court, were taken out by Mohan Lal, who succeeded Kishn Lal as the gomashta of the firm. However irregular the proceedings have been, we are not prepared to hold they are invalid. We must set aside the order of the Judge, disallowing the application as barred by limitation, and remand the case for the decision of the other pleas raised. Costs of this appeal will abide and follow the result.

Cause remanded.

NOTES.

[The agent's action was held insufficient in (1903) 26 All. 19; 23 A. W. N. 172. See also (1912) P. R. 118.]

[512] FULL BENCH.

The 14th August, 1877.

PRESENT :

SIR ROBERT STUART, K.T., CHIEF JUSTICE, MR. JUSTICE PEARSON,
 MR. JUSTICE TURNER, MR. JUSTICE SPANKIE, AND
 MR. JUSTICE OLDFIELD.

Bhikhan Khan and another.....Plaintiffs
versus

Ratan Kuar.....Defendant.*

*Act XVIII of 1873 (North-Western Provinces' Rent Act), ss. 31, 34, 35, 93,
 206, 207—Act XIX of 1873 (North-Western Provinces' Land
 Revenue Act), s. 3, cl. 8.—Co-sharer—Lambardar—
 Suit for Profits—Jurisdiction—Civil Court—Revenue Court—
 Profits when due—Limitation.*

Held, by the Division Bench, following the ruling of the majority of the Full Bench in *Ashraf-un-nissa v. Umrao Begam* † that a suit by a co-sharer in an undivided mahal against the heir of a deceased lambardar for his share of profits collected by the lambardar before his death is a suit cognizable not by a Civil Court but by a Court of Revenue.

Per STUART, C.J.—Observations on the application of ss. 206 and 207 of Act XVIII of 1873.

Held, by the majority of the Full Bench, that the share of a co-sharer in an undivided mahal of the profits of the mahal for any agricultural year are due to him from the lambardar as soon as, after the payment of Government revenue and [513] village-expenses, there is a divisible surplus in the hands of the lambardar, unless by agreement or custom a date is fixed for taking the accounts and dividing the profits, in which case any divisible surplus which may have accrued prior to that date is due on that date, and the divisible profits in respect of any arrears which may be collected after that date are due when they reach the hands of the lambardar or his agent.

Held, per STUART, C.J., and SPANKIE, J.—That where by agreement or custom there is no date fixed for dividing such profits, the share of a co-sharer becomes due on the last day of the agricultural year as fixed by Acts XVIII and XIX of 1873.

* Special Appeal, No. 1256 of 1875, from a decree of G. H. Lawrence, Esq., Judge of Aligarh, dated the 2nd September 1875, affirming a decree of Maulvi Sami-ul-lah Khan, Subordinate Judge of Aligarh, dated the 27th November 1874.

† This is an unreported case which arose out of a reference to the High Court under s. 205 of Act XVIII of 1873. The suit was one by a co-sharer in a mahal to recover the profits due on her share for the years 1279 and 1280 fasli, from the heir of the lambardar who made the collections for those years and subsequently died. It was instituted under s. 93, cl. (h), Act XVIII of 1873.

The reference was made in view of the case of *Mata Deen v. Chundee Deen*, H.C.R., N.-W.P., 1870, p. 54, and of *Mata Deen Doobey v. Chundee Deen Doobey*, H.C.R., N.-W.P., 1874, p. 118.

The Divisional Court (TURNER and SPANKIE, JJ.), before which the reference came, referred it to the Full Bench, the order of reference being as follows :—

It appears to us, and indeed has been held by us on former occasions, that—(a) the heir of a deceased lambardar succeeds to the cause of action and must sue in the Revenue Court; (b) the heir of a deceased lambardar is liable for debts of the deceased if he has inherited assets, and therefore the suit is not a suit for profits, although incidentally the amount of the share of the profits claimed must be determined. As our views on the first question are opposed to a recent decision, we refer this reference to a Full Bench for disposal.

THIS was a suit for a share of the profits of a mahal for 1278 fasli, instituted in the Court of the Subordinate Judge on the 29th June 1874. The plaintiffs, who were co-sharers in the mahal, alleged that the profits for that year had been collected by Bulaki Das, a co-sharer and lambardar, that their share of these profits became due and payable on the 1st July 1871, but had not been paid to them, and they sued the widow of Bulaki Das, who was his heir and in possession of his estate, for the share. The defendant set up as a defence, among other matters, that the suit was, under s. 93 of Act XVIII of 1873, cognizable by a Court of Revenue, and that, as the profits for the year 1278 fasli became due, not on the [514] 1st July 1871, but on the 3rd June 1871, when that agricultural year ended, the suit was barred by limitation, not having been brought within three years from the latter date. The Court of First Instance held that the suit was cognizable by a Civil Court, but dismissed it on the ground that it was barred by limitation, not having been instituted within three years from the 3rd of June 1871, the end of 1278 fasli,* or setting that date aside and considering that that year ended on the 15th June 1871, the last day of payment of the last instalment of Government revenue, within three years of such latter date. The plaintiffs appealed,

PEARSON, TURNER, SPANKIE, and OLDFIELD, JJ., concurred in the following opinion :—

When the cause of action survives, the nature of a suit is not changed by reason that the plaintiff or defendant is not the person to or against whom the cause of action has accrued but his legal representative ; and this being so, it would seem to follow that, where a special Court has been constituted for the trial of suits of a particular nature, the Court has cognizance of suits of that nature, whether they be brought against the person to or against whom the cause of action accrued or his legal representative.

Thus, in the case out of which this reference has arisen, if the suit has been brought against the defendant as the legal representative of the deceased, it cannot be argued that, except in the circumstance that the representative is sued instead of the deceased, there is any feature in the suit other than would have been present had the suit been brought in the lifetime of the deceased.

The circumstance that a legal representative is substituted for one of the parties is an accident to rather than a property of the suit. Of course, when a legal representative appears as defendant, the decree cannot be executed against him personally, but only against the estate of the deceased.

If, however, a claim be brought, not against the legal representative to obtain relief out of the estate of the deceased, but against an heir or stranger, on the ground that he has taken and converted to his own use assets of the deceased, and so rendered himself personally liable for the debts of the deceased, the suit is not a mere suit for profits, but a suit which differs in an essential point from the suit which would have been brought against the deceased had he survived ; a liability has been created by the act of the heir or stranger attaching to such heir or stranger personally, and on that liability the right of suit is founded. If then a suit be brought against an heir or stranger, to recover from him personally a debt due to the plaintiff in respect of his profits as co-sharer on the ground that the defendant has intermeddled with the estate of the person who collected the profits, the suit lies, not in the Revenue, but in the Civil Court.

STUART, C. J.—I concur in the last case suggested in the above answer, but I cannot accept as law what is laid down in the first part of it ; and generally I remain of the opinion explained in my judgment in *Mata Deen Doobey v. Chandee Deen Doobey*, in our Reports for 1874, page 118. The heir of a deceased lambardar may succeed to the cause of action, or rather to the subject-matter of the cause of action, but it does not therefore follow that the heir can sue in the Revenue Court. That which is here called a cause of action is really a right to recover a portion of the deceased's estate, and can only be sued for in a Civil Court. Again, the circumstance that a legal representative is substituted for a deceased party may be an accident rather than a property of the suit, but it is an accident, in my opinion, which determines the *forum* where the suit may be prosecuted to decree.

I have only to add that Act XVIII of 1873 does not affect the question submitted to us, the principle, so far as the legal position of the heir is concerned, being the same as under Act XIV of 1868.

*According to the official calendar the year 1278 fasli did not end till the 28th September 1871.

contending that the suit was governed by art. 118, sch. ii, Act IX of 1871, and the period of limitation was consequently six years. The lower Appellate Court, without deciding whether the suit was cognizable by a Civil Court or a Revenue Court, held that the period of limitation applicable to it was that prescribed in s. 94 of Act XVIII of 1873, *viz.*, three years, and that it was barred by limitation not having been instituted within three years from the last day of Jait 1278 *fusli*, that is to say, the 3rd of June 1871.

The plaintiffs appealed to the High Court, contending that the suit being cognizable by a Civil Court, the period of limitation applicable to it was that laid down in art. 118, sch. ii of Act IX of 1871, and not that in s. 94 of Act XVIII of 1873, and that even if the period of limitation applicable was three years and such period was computed from the end of 1278 *fusli*, that year did not end on the 3rd June 1871, but on the 30th June 1871, and the suit was within time. The respondent objected, under s. 348 of Act VIII of 1859, that the suit was cognizable by a Court of Revenue.

STUART, C.J., and PEARSON, J., before whom the appeal came on for hearing, referred to a Full Bench the question how the day on which the profits are due to, and claimable by, co-sharers in a mahal, is to be ascertained.

The Orders of reference were as follows :—

Pearson, J.—A recent ruling of the Full Bench of this Court [see p. 512, note (1)] has declared a suit of the nature of the present to be cognizable by [515] the Revenue and not by the Civil Courts. We must therefore, in pursuance of that ruling, admit the validity of the objection urged by the respondent, under s. 348 of Act VIII of 1859, to the extent that the Subordinate Judge was incompetent to take cognizance of the suit. The lower Appellate Court was, however, warranted in disposing of the appeal preferred to it by the provision of s. 207 of the new Rent Act, and, under that or the following section, we are also bound to deal with the appeal before us. The first plea fails in reference to the ruling above mentioned.

The question raised by the second plea next presents itself for consideration. By s. 94 of the Act above mentioned a suit for a share of the profits of a mahal must be brought within three years from the day on which the share became due. But the law does not fix the day on which the share becomes due. It may be fair and reasonable to hold that it becomes due on the last day of Jait of the *fusli* year, but it would be not less fair and reasonable to hold the last day of the agricultural year, as defined in Act XIX of 1873, to be the day from which the period of limitation should run. Again, it might be held that when by agreement or by custom a particular day had been fixed for the distribution of profits in any mahal, or for a settlement of accounts, the time should run from such day. But where no such day has been fixed by agreement or custom, there would still be room for doubt. I would refer the question how the day on which the profits are due to, and claimable by, co-sharers in a mahal is to be ascertained, to a Full Bench.

Stuart, C.J.—The ruling of the Full Bench referred to by Mr. Justice PEARSON was strongly dissented from and is still strongly dissented from by me as matter of law. But if not only in this suit but in all other similar cases I am absolutely bound by that ruling, then of course I must hold that the respondent's objection is well founded, and it was taken in the Court of First Instance, s. 207 of the Rent Act therefore strictly applies.

That section is in the following terms :—"If in any such suit such objection was taken in the Court of First Instance, but the Appellate Court has

before it all the materials necessary for the determination of the suit, it shall dispose of the appeal as if the suit had been instituted in the right Court." The nature of the suit [§16] here referred to and the objection are described in s. 206, which is as follows:—"In all suits instituted in any Civil or Revenue Court, in which an appeal lies to the District Judge or High Court, an objection that the suit was instituted in the wrong Court shall not be entertained by the Appellate Court, unless such objection was taken in the Court of First Instance, but the Appellate Court shall dispose of the appeal as if the suit had been instituted in the right Court." It thus appears that "the suit" and "the objection" are the same in both sections, but the manner in which the objection is to be treated is very different. Section 206 applies, by implication, where the objection had not been taken in the Court of First Instance, and goes on to provide that the objection shall not be entertained, i.e., shall not be looked at, shall not be taken cognizance of, or in any way noticed, but shall be altogether disregarded, and the appeal shall proceed as if the objection had never been taken at all; and, therefore, where, as in the present case, the suit had been instituted in the Civil Court, that Court shall be deemed the right Court, that is s. 206. Section 207, as I have stated, applies where the objection has been taken in the Court of First Instance, and where, by implication, the objection has been entertained and allowed, and it goes on to provide for the case where the Appellate Court has before it all the materials necessary for the determination of the suit, in which case the Appellate Court "shall dispose of the appeal as if the suit had been instituted in the right Court," which, in the present case, must be understood to be the Revenue Court, and of course according to revenue law. That being so, the limitation of three years prescribed by s. 94 of the Rent Act of course governs. But I share the doubt and difficulty expressed by Mr. Justice PEARSON respecting the date from which the limitation is to run. On this subject I concur in the reference to the Full Bench proposed by Mr. Justice PEARSON.

Pandits Bishambhar Nath and Ajudhia Nath, for the Appellants.

Munshis Hanuman Prasad and Sukh Ram, for the Respondent.

The Full Bench delivered the following **Judgments**:—

Pearson (TURNER and OLDFIELD, J.J., *concurring*).—The lambardar collecting rents on account of himself and the other co-[§17]sharers in a revenue-paying mahal is entitled to apply the collections, firstly, to the payment of Government revenue and village-expenses, and then, after deducting what (if anything) is due to himself as *haq lambardari*, is bound to divide surplus collections among the several co-sharers in proportion to their shares. Ordinarily then profits are due as soon as there is a divisible surplus in the hands of the lambardar. But it not unfrequently happens that by agreement or custom a date is fixed for taking the accounts and dividing the profits, in this case any divisible surplus which may have accrued prior to that date is due on the date so fixed, and the divisible profits in respect of any arrears which may be collected after that date are due at the time they reach the hands of the lambardar or his agent.

Spankie, J.—The share, it appears to me, becomes due at the end of the agricultural year, when the rents have been collected and the Government revenue has been paid. The village-accounts should then be made up. Probably custom or agreement between the shareholders regulates the practice. A Court dealing with a question of this nature should ascertain whether there is any custom or agreement between the shareholders to which it might refer for the determination of the date from which limitation should run. Where there is

no custom or agreement, the safest guide would be the end of the agricultural year, as defined in cl. 8, s. 3 of Act XIX of 1873, that is to say, the thirtieth day of June. This also is the date fixed in the Rent Act as the day upon which the agricultural year expires—*vide* ss. 31, 34, and 35 of Act XVIII of 1873. It may be said that the lambardar may not have been able to collect the rents and that there are no profits to distribute, or that each share is less than the shareholder is ordinarily entitled to receive. In such a case the share would still be due at the close of the agricultural year on the assumption that the rents have been collected, and it would be for the lambardar to show that there were no profits, and that he had exercised all due diligence as lambardar and trustee for the sharers in collecting the rents and income of the estate. So in all disputes between co-sharers, whatever might be the nature of the defence, the share would become due at the expiration of the agricultural year. I would, therefore, say that where no custom is found to exist regulating the practice, or where there is no agreement [518] between the shareholders on the point, the share becomes due on the 30th June in each year.

Stuart, C. J.—I concur substantially in the opinion of Mr. Justice SPANKIE. I observe in the case that was before Mr. Justice TURNER and myself in April of last year, *Girdhari Lal v. Lahori* (unreported), Special Appeal No. 1336 of 1875, in which we made a remand, we expressed the opinion that the limitation of three years ran “from the date when the profits became payable,” or otherwise, as we go on to explain, “in the absence of any custom or agreement to the contrary, profits become due from the time when they reach the lambardar’s hands,” which I suppose must be taken to be at the end of the agricultural year, that is, in this case, on the 30th of June of each year. But it might be well to enquire whether there is any custom or agreement on the subject in the district of Aligarh, where the property here in suit is situated.

NOTES.

[SUIT BY HEIR OF SHARER--

Revenue Courts have jurisdiction :—(1882) 4 All. 412; *exclusively* (1892) 14 All. 381; *contra* see (1883) 5 All. 438.]

[1 ALL. 518]

FULL BENCH.

The 3rd December, 1877.

PRESENT :

SIR ROBERT STUART, K.T., CHIEF JUSTICE, MR. JUSTICE PEARSON,
 MR. JUSTICE TURNER, AND MR. JUSTICE SPANKIE.

Altaf Ali.....Judgment-debtor

versus

Lalji Mal and another.....Decree-holders.*

Trespass on land—Mesne profits.

Held, by the majority of the Full Bench, that a trespasser on the land of another should, in estimating the mesne profits which the owner of the land is entitled to recover from him, be allowed such costs of collecting the rents of the land as are ordinarily incurred by the owner, where such trespasser has entered or continued on the land in the exercise of a *bond fide* claim of right, but where he has entered or continued on the land without any *bond fide* belief that he was entitled so to do, the Court may refuse to allow such costs, although he may still claim all necessary payments, such as Government revenue or ground-rent.

Per STUART, C.J.—Whether such trespasser is a trespasser *bond fide* or not, he should be allowed such costs.

THIS was an application to recover in execution of a decree the mesne profits of certain villages accruing between the date of the decree and the date on which possession of the villages was obtained [519] under the decree by the decree-holders. The judgment-debtor pleaded, among other matters, that the expenses of collecting the rents should be deducted from the sum claimed by the decree-holders. The Court of First Instance refused to make this deduction on the ground that the judgment-debtor had been in wrongful possession of the villages.

The judgment-debtor appealed to the High Court against the order of the Court of First Instance allowing execution of the decree, contending, among other things, that the expenses of collection should be allowed to him.

STUART, C.J., and PEARSON, J., before whom the appeal came on for hearing, referred the case to a Full Bench, the order of reference being as follows :—

In reference to the second plea in appeal, we observe that the lower Court, in refusing to allow the appellant to charge the estate with the expenses of collection in any shape has relied on the precedent of the 29th November 1862, No. 780 (S. D. A., N.-W. P., 1862, vol. ii, 246), which, however, only followed the ruling in an earlier case, No. 271 of 1854, decided on the 28th January 1856 by BEGBIE, HARINGTON and M. SMITH, JJ., to the effect that a commission on such an account can only be allowed when the possession of the party claiming the same was not wrongful (S. D. A., N.-W. P., 1856, p. 49). No subsequent ruling of this Court to the contrary has been brought to our notice. But

* Miscellaneous Regular Appeal, No. 52 of 1876, from an order of Rai Bakhtawar Singh, Subordinate Judge of Bareilly, dated the 2nd August 1876.

it would appear from the decisions of the Calcutta High Court, dated the 24th January 1867, in case No. 876 of 1866 (7 W. R., 78)—dated the 6th March 1867, in case No. 875 of 1866 (7 W. R., 230)—and the 8th April 1868, in case No. 621 of 1867 (9 W. R., 457), that a different principle is adopted by that Court, and that it is held equitable and reasonable to allow the charges of collection to be defrayed out of the mesne profits of an estate, even when the expenditure has been made by a person wrongfully in possession, on the ground that the rightful owner, had he been in possession, would have had to bear them. We ask the Full Bench to consider and determine which of the two views is the sounder and more correct.

Mr. Conlan and Mir Zahur Husain for the Appellant.

The Junior Government Pleader (*Babu Dwarka Nath Banarji*) and Pandit *Bishambhar Nath* for the Respondents.

[520] The following Judgments were delivered by the Full Bench:—

Stuart, C.J.—It appears to me that the Calcutta rulings referred to in the order of reference expound the law correctly.

The Subordinate Judge says that the defendant held possession of the villages without any reason or right, and he therefore concludes that he is not entitled to any collection-fee or village-expenses; but in this view he is clearly mistaken, not only on the authority of those Calcutta rulings, but on the principle that any claim such as is made against the defendant here must be founded on wrong towards the plaintiff (*Addison on Torts*, p. 11); and the plaintiff can show no such wrong by the fact that the defendant, although wrongfully in possession, had merely made payments which the plaintiff himself, or any other owner, would have had to meet. A recent decision of the Calcutta Court (*KEMP and PONTIFEX, JJ.*) (I. L. R., Cal., 406) appears to recognise the same principle, where it was held that no suit for damages as between joint owners on undivided estates will lie in consequence of the sale of the whole estate through the default of one or more of such owners in paying their shares of the Government revenue, the meaning of which ruling appearing to be that no wrong can be pleaded in such a case as the present by the defendant, whether a *bond fide* trespasser or not, paying the Government revenue, for that must be paid *as from the land*, and no matter by whom, whether legally or merely ostensibly in possession.

The English case of *Wood v. Morewood* (3 Q. B., 446) was an action for an injury to the plaintiff's reversion in certain closes by making holes and excavations and getting coals, with a count in trover for coals, and Baron Parke told the jury that "if they thought that the defendant was not guilty of fraud or negligence, but acted fairly and honestly in the full belief that he had a right to do what he did, they might give the fair value of the coals, as if the coal-field had been purchased from the plaintiff." In another English case, *Doe v. Hare* (2 C. and M., 145), referred to in *Mayne on Damages*, ed. 1856, p. 255, it was laid down that "if the defendant has made any payment while in possession for which plaintiff would be liable, [521] as ground-rent, he is entitled to have it taken in reduction of damages." But the principle thus recognized appears to me to go further, and, I think, justifies me in holding that, whether the defendant is a trespasser *bond fide* or not, he is entitled as against the rightful owner to be credited with all such payments in respect of the land as these collection-fees and other village-expenses.

Pearson, (TURNER and SPANKIE, JJ., concurring).—When in the exercise of a *bond fide* claim of right a trespasser enters on and holds the property of

another, the owner is sufficiently compensated by receiving an amount equivalent to the net profits he would have himself received had he been in possession. In such a case then such costs of collection as are ordinarily incurred by the owner might fairly be allowed to the trespasser, as well as such sums as must of necessity be paid, as, for instance, Government revenue. But when the trespass is altogether tortious and malicious, in other words, when the trespasser has entered or continued on the property without any *bond fide* belief that he is entitled to do so, where in defiance of the rights of another he has thrust himself into an estate, although he may still claim all necessary payments, such as Government revenue or ground-rent, it is not imperative on the Court, in estimating the damages, to allow the wrong-doer even such charges as would ordinarily, but voluntarily, be incurred by an owner in possession, but the Court may refuse to sanction the deduction of such charges—*Wood v. Morewood* (3 Q. B., 440).

NOTES.

[Trespasser when allowed charges of collection, see (1901) 23 All. 252 ; (1900) 22 All. 262 ; (1902) 24 All. 376.]

[1 ALL. 521]

APPELLATE CIVIL

The 3rd December, 1887.

PRESENT :

MR. JUSTICE SPANKIE AND MR. JUSTICE OLDFIELD.

Abadi Begam.....Defendant
versus
 Imaan Begam.....Plaintiff.*

Muhammadan Law—Pre-emption.

Under Muhammadan law, the legal forms to be observed under that law by a person claiming a right of pre-emption may be observed on behalf of such person by an agent or manager of such person.

[522] The right of pre-emption may be claimed after a sale, notwithstanding there has been a refusal to purchase before the sale, where there has been no absolute surrender or relinquishment of the right, and such refusal has been made simply in consequence of a dispute as to the actual price of the property.

THIS was a suit for pre-emption in respect of a dwelling-house founded on the Muhammadan law of pre-emption by vicinage. The "*talab-i-murrasabat*," or immediate claim to the right of pre-emption, and the "*talab-i-ishhad*," or affirmation by witness, the forms to be observed, under the Muhammadan law, in asserting the right of pre-emption, having been made by the plaintiff's husband on the plaintiff's behalf, the defendant, vendee, alleged that the requirements of that law had not been properly fulfilled; she further alleged that she had purchased the property after the plaintiff had refused to purchase it. The Court of First Instance held that the "*talab-i-murrasabat*" and the "*talab-i-ishhad*" might, under Muhammadan law, be made by the agent of the person claiming the right of pre-emption, and that, as the right of pre-emption

* Special Appeal, No. 785 of 1877, from a decree of R. F. Saunders, Esq., Judge of Farukhabad, dated the 19th April 1877, affirming a decree of Maulvi Wajid Ali, Munsif of Karimganj, dated the 6th March 1877.

accrued after and not before a sale, the plaintiff's refusal to purchase before the sale to the defendant did not affect her right of pre-emption and gave the plaintiff a decree, which on appeal by the defendant was affirmed.

On special appeal by the defendant to the High Court it was again contended by her that the plaintiff had not fulfilled the requirements of the Muhammadan law, and that her refusal to purchase the property destroyed her right of pre-emption.

Pandit Ajudhia Nath and Babu Oprokash Chandar, for the Appellant.

Munshi Hanuman Prasad and Pandit Nand Lal, for the Respondent.

The Judgment of the Court, so far as it related to the above contention, was as follows :—

Spankie, J.—The second plea, too, cannot be maintained. The first Court found on the evidence of five witnesses that, immediately on hearing of the sale, the plaintiff fulfilled the conditions of the Muhammadan law by immediately asserting her claim and by affirmation before witnesses. The Judge affirmed this finding. The claim was made by the plaintiff's husband, but nothing was shown [523] to us to support the plea that a claim so made was invalid. On the contrary, it appears to us that an agent or manager, as in this case, the husband for his wife, may legally assert a pre-emptive claim. The point was not seriously disputed before us.

It was orally argued that the Judge had erroneously held that a refusal before a sale, which was all that could be proved in this case, does not vitiate a right of pre-emption advanced by the purchaser after the sale, provided there is no delay.

The plea was not taken in the memorandum of appeal, and it is doubtful how far any refusal to purchase has been established. We may, however, observe that, if anything is proved, it does not go beyond a refusal of the plaintiff to purchase at the rate demanded by the vendor, on the ground that the actual sale-price was less than that demanded from the pre-emptor. The plaintiff offered to deposit any sum that the Court found to have been the actual purchase-money, and has all along asserted that the sale-price was Rs. 130 and not Rs. 200. As we read the Muhammadan law on this point, we find that the right of pre-emption is void if the pre-emptor relinquishes the purchase in plain terms, and any indication of acquiescence in the sale to another would also vitiate a claim after the sale on the part of the pre-emptive claimant. But a claim relinquished upon misinformation of the amount of sale-consideration, or of the property sold, may be resumed when the real facts become apparent. Whether this be so or not, we should, where there had been no absolute surrender or relinquishment of a claim, but where the refusal was simply in consequence of a dispute as to the actual sale-consideration, hesitate to hold that, after the completion of the purchase by a stranger, the right of pre-emption could not be resumed. It would be our duty to follow the dictates of equity. It would neither be just nor equitable to lay down so hard a rule, as that a refusal to purchase before the actual completion of a sale to another would in all cases bar a subsequent claim, when the right of pre-emption accrues after the completion of the purchase.

Appeal dismissed.

NOTES.

[PRE-EMPTION

The demand may be made by an attorney :—(1906) 28 All., 691 3 A. L. J. 798—(1906) A. W. N. 177; by guardian or manager under Court of Wards :—(1908) 35 Cal., 575.]

[524] APPELLATE CIVIL.

The 6th December, 1877.

PRESENT :

MR. JUSTICE TURNER, AND MR. JUSTICE SPANKIE.

Sahib Zadah and others.....Defendants

versus

Parmeshar Das and another.....Plaintiffs.*

Usufructuary mortgage—Redemption of mortgage—Conditional decree.

In a suit to recover possession of certain lands founded on the allegation that the defendants had obtained possession of them from the plaintiffs as usufructuary mortgagees, and that the mortgage-debt had been satisfied from the usufruct of the lands, the lower Court, although it found that the mortgage-debt had not been satisfied as alleged, gave the plaintiffs a decree for possession conditional on the payment of the balance of the mortgage-debt. Held that, inasmuch as the defendants never rendered any accounts, and inasmuch as no agreement had been made between the parties as to the amount at which the profits of the lands should be estimated, it was impossible for the plaintiffs to have ascertained before suit what sum, if any, was due by them, and seeing that whether such decree was altered or not, the plaintiffs might immediately pay the balance of the mortgage-debt and demand possession, it was unnecessary to interfere with such decree.

THIS was a suit for possession of certain lands founded on the allegation that the defendants were in possession of the same as usufructuary mortgagees under a mortgage from the plaintiffs, and that, as the mortgage-debt had been satisfied from the usufruct of the lands, the plaintiffs were entitled to possession and also to mesne profits for two years. The defendants denied that they were in possession of the lands as usufructuary mortgagees, and that the annual profits of the lands were as large as the plaintiffs asserted them to be. The Court of First Instance, fixing an issue as to the amount of the annual profits of the lands, decided that the defendants were in possession of certain of the lands as usufructuary mortgagees, and that the mortgage-debt had not been satisfied from the usufruct, and gave the plaintiffs a conditional decree in respect of those lands. On appeal by the defendants the lower Appellate Court also decided that the defendants were in possession of certain of the lands as usufructuary mortgagees, and gave the plaintiffs a conditional decree in respect of those lands.

On special appeal by the defendants to the High Court it was contended by them that, inasmuch as the plaintiffs had sued on the [525] allegation that the mortgage-debt had been satisfied, and it had been found that this was not the case, the plaintiffs were not entitled to a conditional decree.

Munshi Sukh Ram, for the Appellants.

Lala Lalta Prasad, for the Respondents.

* Special Appeal, No. 900 of 1877, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Ghazipur, dated the 25th April 1877, modifying a decree of Munshi Kishori Lal, Munsif of Rasrah, dated the 22nd December 1876.

The Judgment of the Court, so far as it is material for the purposes of this report, was as follows :—

Turner, J.—We are not satisfied that a conditional decree was improper in this case. It does not appear that the appellants ever rendered any accounts; indeed, they denied they were in possession as mortgagees, and inasmuch as no agreement had been made as to the amount at which the profits should be estimated, it was impossible for the respondents to have ascertained before suit what sum, if any, was due by them. The more proper course would have doubtless been for the respondents to have offered to pay what might be found due. Seeing that whether the decree is altered or not the respondents may immediately pay the balance and demand possession, and the appellants could not legally refuse it, we think it unnecessary to interfere with the decree in this case.

[1 All. 525]

APPELLATE CIVIL.

The 7th December, 1877.

PRESENT :

MR. JUSTICE PEARSON, AND MR. JUSTICE SPANKIE

Husain Bakhsh.....Decree-holder

versus

A. D. Madgo.....Judgment-debtor.¹

Execution of decree—Application to enforce or keep in force the decree—

Limitation—Act VIII of 1859 (Civil Procedure Code), ss. 212, 285—

Act IX of 1871 (Limitation Act), sch. ii, art. 167.

Held that an application under s. 285 of Act VIII of 1859, being a necessary and decided step towards the execution of the decree, was an application to enforce or keep in force the decree within the meaning of art. 167 sch. ii, of Act IX of 1871.

THIS was an application for the execution of a decree. The decree was passed by the Civil Judge of Lucknow on the 20th February 1874. On the 28th May 1875, the decree-holder made an application to the Civil Judge of Lucknow, under s. 285 of Act [526] VIII of 1859, that a copy of the decree should be transmitted to the District Court at Allahabad, together with a certificate that satisfaction of the decree had not been obtained. This application was granted, and on the 5th April 1877 the present application for execution of the decree was made, under s. 212 of Act VIII of 1859, to the District Court at Allahabad. That Court held, on objection taken by the judgment-debtor, that the

* Miscellaneous Regular Appeal, No. 64 of 1877, from an order of H. Lushington, Esq., Judge of Allahabad, dated the 20th June 1877.

application was barred by limitation, inasmuch as no previous application under s. 212 of Act VIII of 1859 had been made. On appeal to the High Court by the decree-holder it was contended that the application dated the 28th May 1875 kept the decree in force.

Mr. Niblett, for the Appellant.

Mr. Chatterji, for the Respondent.

The Judgment of the Court was delivered by

Pearson, J.—The Judge apparently holds the present application, dated 5th April last, for the execution of the decree of the 20th February 1874 to be barred because no previous application of the nature described in s. 212, Act VIII of 1859, had been made. But such an application could not well be made to the Court which passed the decree, if the decree could not be executed within its jurisdiction. The only application which could usefully be made to the Lucknow Court was that which was made to it on the 28th May 1875. The remark that no application under s. 212 was made at the same time is of no weight or importance. The question is whether the application of the 28th May 1875 was not one to enforce or keep in force the decree within the scope and meaning of art. 167, sch. ii, Act IX of 1871. It is difficult to conceive any other object which the applicant can have had in view in making the application than the enforcement or keeping in force the decree. The idea of *mala fides* is preposterous. The application was a necessary and decided step towards the execution of the decree (see Indian Limitation Act, 1877, sch. ii, art. 179) in the Allahabad district. Under these circumstances we cannot but regard it as an application within the terms of art. 167 aforesaid; and the present application being within three years from the date of that application is within time. The view we take [527] of the nature of the application of 28th May 1875, is supported by a decision of a Bench of this Court, dated 22nd ult., in miscellaneous special appeal No. 61 of 1877, *Banki Behari, appellant v. Musammat Iahsi, respondent*.

We reverse the lower Appellate Court's order of 20th June last, and, decreeing the appeal with costs, direct that the application be allowed and proceeded with.

Appeal allowed.

NOTES.

[Followed in (1879) 2 All. 284. See also (1878) 1 All. 580 F, B. where the principle laid down as regards Limitation was affirmed.]

* [Art. 167 :—*q. v. supra* 1 All., 185]

[1 ALL. 527]

APPELLATE CRIMINAL.

The 7th December, 1877.

PRESENT :

MR. JUSTICE PEARSON, AND MR. JUSTICE TURNER.

Empress of India

versus

Salik.

Act XLV of 1860 (Indian Penal Code), s. 211—False charge.

To constitute the offence of making a false charge, under s. 211 of the Indian Penal Code, it is enough that the false charge is made and that the charge is not pending at the time of the offender's trial. *The Queen v. Subbanna Gaundan* (1 Mad. H. C. Rep. 30) followed.

THIS was an appeal to the High Court by the Local Government against a judgment of acquittal passed by Mr. J. W. Power, Sessions Judge of Ghazipur, dated the 8th September 1877, reversing a judgment of conviction passed by Mr. A. E. C. Casey, Assistant Magistrate of the first class, dated the 1st August 1877.

As this case merely follows *Reg. v. Subbanna Gaundan* (1 Mad. H. C. Rep., 30) already followed in *Empress of India v. Abul Hasan* (I. L. R. 1 All., 497), it is not reported in detail.

NOTES.

[Same as (1877) 1 All. 497 supra, See also (1896) 22 Bom. 596 and also our notes to (1880) 6 Cal. 496.]

[1 ALL. 527]

CRIMINAL JURISDICTION.

The 15th December, 1877.

PRESENT :

MR. JUSTICE SPANKIE.

Muthra

versus

Jawahir and others.

*Public ferry—Act XLV of 1860 (Indian Penal Code), ss. 188, 441—**Criminal trespass—Regulation VI of 1819, s. 6—Disobedience to order duly promulgated by public servant—Act VIII of 1851.*

A person plying a boat for hire at a distance of three miles from a public ferry cannot be said, with reference to such ferry, to commit "criminal trespass" within the meaning of that term in s. 441 of the Indian Penal Code.*

* As to "criminal trespass" on a right of fishery in a public river, see *The Empress v. Charu Nayyah*, I. L. R., 2 Cal., 354.

[528] If, when directed by the order of a public servant, duly promulgated to him, to abstain from plying a boat for hire at or in the immediate vicinity of a public ferry, a person disobeys such direction, he renders himself liable to punishment under the Indian Penal Code.

THIS was a reference to the High Court, under s. 296 of Act X of 1872, by Mr. J. H. Prinsep, Sessions Judge of Cawnpore, which arose out of the following circumstances :—

The lessee of a public ferry situated on the Jumna at Barah, pargana Kalianpur, zila Fatehpur, complained to Mr. G. S. D. Dale, Officiating Magistrate of the District, that one Jawahir and certain other persons, *mallahs*, residents of a village situated some three miles to the north-west of his ferry, where there was no authorized public ferry, were in the habit of plying boats for hire illegally, thereby diminishing the profits of his ferry. The Magistrate of the District directed his subordinate, Mr. J. H. Carter, to take up and dispose of the case. Mr. J. H. Carter being of opinion that there was no law obtaining in these provinces by which the illegal plying of boats for hire could be punished, the Magistrate of the District referred him to Act VIII of 1851, Act XV of 1864, Circular No. 22 of 1874, dated the 19th September 1874, published by the Public Works Department of the Local Government, and s. 447 of the Indian Penal Code. Mr. J. H. Carter thereupon charged the accused persons with an offence under s. 447 of the Indian Penal Code, and having tried them summarily acquitted them, on the ground apparently that they were not legally punishable under that section. The Magistrate of the District, with a view to obtaining the orders of the High Court, submitted the case to the Court of Session, who referred it, as stated above, to the High Court, observing that the case should, in its opinion, be governed by s. 6 of Regulation VI of 1819, and the accused were liable to punishment for disobeying any orders which might have been previously issued to them as well as for criminal trespass on the rights of the lessee, which matters, however, should form the subject of fuller inquiry, and that the Acts and Circulars referred to by the Magistrate of the District, as they related to the levy of tolls on roads and bridges, floating or stationary, did not appear to it to apply.

The parties to the case were unrepresented.

[529] Spankie, J.—I am not prepared to say that the Joint Magistrate has improperly acquitted the accused, who was charged with criminal trespass. This offence is defined in s. 441 of the Indian Penal Code as follows: “Whoever enters into or upon property in the possession of another, with intent to commit an offence (offence denotes a thing made punishable by the Penal Code), or to intimidate, insult, or annoy any person in possession of such property; or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult, or annoy any such person, or with intent to commit an offence, is said to commit criminal trespass.” From the statement of the Officiating Magistrate of the District, it would appear that the criminal trespass charged consisted in accused plying a boat for hire on the Jumna, three miles to the north-west of the public ferry at Barah, which had been leased to the complainant. Mr. Carter, the Joint Magistrate, considers that no offence as defined in s. 441 of the Penal Code was committed, and looking at the terms of the section, and the admitted fact that the accused had plied the boat at a distance of *three* miles from complainant’s ferry, I concur with Mr. Carter’s view of the case.

Section 6, Regulation VI of 1819, prohibits all persons from employing a ferry-boat plying for hire at or in the *immediate vicinity* of public ferries without

the previous sanction of the Magistrate. If, in the case of a prohibition distinctly made known to a person, he continued to ply a boat for hire at or in the immediate vicinity of a public ferry, the Magistrate doubtless is empowered by the Penal Code to punish him for his disobedience of such order.

Act VIII of 1851 enables the Government to levy tolls on public roads and bridges, and s. 6 relates to a distinct offence, defined in the section, committed against the person appointed to collect the toll at a public ferry or bridge, and also to the offence of unlawfully and extortionately demanding a higher rate of toll than that fixed by the schedule to the Act. It would hardly apply to the particular case before the Court.....
..... The Court, as at present advised, sees no ground for interference under s. 297 of the Criminal Procedure Code.

[530] CRIMINAL JURISDICTION.

The 15th December, 1877.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND
MR. JUSTICE SPANKIE.

Empress of India

versus

Kampta Prasad.

Public servant—Illegal gratification—Acceptance of present—Act XLV of 1860 (Indian Penal Code), ss. 161, 165.

K, a Police-officer, employed in a Criminal Court to read the diaries of cases investigated by the Police and to bring up in order each case for trial with the accused and witnesses, after a case of theft had been decided by the Court in which the persons accused were convicted, and a sum of money, the proceeds of the theft, had been made over by the order of the Court to the prosecutor in the case, asked for and received from the prosecutor a portion of such money, not as a motive or reward for any of the objects described in s. 161 of the Indian Penal Code, but as "*dusturi*." Held that *K* was not, under these circumstances, punishable under s. 161 of the Indian Penal Code, but under s. 165 of that Code.

KAMPTA Prasad, a Police-officer, was employed in the Court of a Magistrate to read the diaries of cases investigated by the Police and to bring up in order each case for trial with the accused and witnesses. On a certain day he brought up, in the usual manner, a case in which one Chattra charged two persons with the offence of theft. These persons were convicted and sentenced, and a sum of money, some Rs. 3, the proceeds of the theft, was, by the order of the Magistrate, made over to Chattra, the prosecutor in the case, who then left the Court-house. Immediately after his departure Kampta Prasad also left the Court-house without orders, there being no reason why he should have left it,

and it subsequently transpired that he had asked Chattrra for and had received from him a portion of the money made over to Chattrra by the Magistrate. On these facts the Magistrate of the District convicted Kampta Prasad of an offence under s. 161 of the Indian Penal Code. On appeal by Kampta Prasad the conviction was set aside by the Sessions Judge, who observed as follows : " I think there is no reasonable doubt that the appellant took a small gratification of one rupee from a plaintiff in a criminal case. There is, however, no evidence whatever produced which proves or makes it even very probable that this gratification was given with any of the objects mentioned in s. 161 of the Indian Penal Code, under which section the appellant has been punished. The payment was made probably exactly as described by the giver, as '*dusturi*', that is, a customary payment made [531] to a person clothed with a little brief authority irrespective of any return or consideration for the payment. Such an offence is probably punishable under s. 29 of Act V of 1861, and in this view of the case I alter the finding of the lower Court and modify its sentence, and order Kampta Prasad to be imprisoned under s. 29 of Act V of 1861 for one month from the 10th September last.

The case was reported for the orders of the High Court.

Spankie, J.—The Sessions Judge appears to me to be right in his view of this case in so far as it is affected by s. 161 of the Indian Penal Code. Under the terms of s. 161 of the Penal Code, the gratification must be taken by a public servant as a motive or reward for doing or forbearing to do any official act, or for showing, or forbearing to show in the exercise of his official functions, favour or disfavour to any person, etc., etc. But it is not pretended here that the one rupee paid to the accused was given to him as a motive or reward for any official act, or for showing or forbearing to show favour or disfavour in the exercise of his official acts. There was no agreement between the parties and indeed no previous connection. The accused was the person attached to the Deputy Magistrate's Court to bring up Police-cases for trial. He is the Police clerk in the Magistrate's office, and he was not the Police-officer who sent in the case nor connected with the Police-inquiry. The party who gave the rupee himself stated that it was asked for and taken as "*dusturi*," after the case had terminated and the accused persons had been convicted. The giver of the rupee had been the original prosecutor. It seems to me that the section requires that the gratification should be taken with the view of doing or forbearing to do an official act, or for showing or forbearing to show favour or disfavour in the exercise of official functions. It is not taken after the act has been done, and without some previous understanding. I do not find evidence in this case that the money was promised and given as a reward for the accused's performance of his duty in Court.

It appears to me that s. 165 more nearly applies, and that as the accused was the subordinate of the Deputy Magistrate who had tried and closed the case, and asked for a reward, the one rupee, after the case was over, he is guilty of accepting "a valuable thing," and without reference to any particular motive or reward for doing or [532] forbearing to do an official act. However, I am desirous that the record should go before a Bench, or that it should be heard before myself and another Judge, as the Hon'ble Chief Justice may direct. I therefore send the case to the Registrar in order that it may be laid before the Hon'ble Chief Justice.

Stuart, C.J.—In accordance with Mr. Justice SPANKIE'S suggestion I directed this case to be brought before the First Bench of the Court, consisting

of Mr. Justice SPANKIE and myself, and the case has been attentively considered by me.

I believe that Mr. Justice SPANKIE remains of the opinion expressed in the note issued by him previously to the case being brought before us, and I quite agree with him that s. 161 of the Penal Code has no application to the facts, and I must express my surprise that the Officiating Magistrate should have so misconceived the law. The motive or reward explained in s. 161 has obviously no application whatever to such a case as this. But, on the other hand, I scarcely think that the one rupee which was given by, or possibly extorted from Chattra, can be regarded as in the nature of "*dusturi*." It appears to me to be too considerable for that, for it was nearly one-third of the whole sum recovered by Chattra. "*Dusturi*" is a customary payment very much less. It varies I believe throughout India from two to four pice on the rupee, and therefore "*dusturi*" in the present case should not have exceeded two annas, if it was proper for Kampta, the policeman, to accept anything of the kind, which I do not think it was. Probably the offence might come under s. 29 of the Police Act, Act V of 1861, for in taking the rupee Kampta appears to have clearly violated the Police instructions—see these on "gratifications."

But I also agree with Mr. Justice SPANKIE that such a case as this is covered by the terms of s. 165 of the Penal Code. The only question is whether the rupee here was a "valuable thing" within the meaning of that section. The value must, I think, be looked at with reference to the proportion it bears to the money or property of which it forms part, and here the rupee was rather less than a third of the whole sum obtained by Chattra from the Criminal Court. I therefore consider that in lieu of the conviction before the Judge, and of the sentence passed by him, Kampta may be [533] convicted under s. 165 of the Penal Code, and that he should suffer four months' simple imprisonment. I would also order him to pay a fine of one rupee, and in default to suffer one month's additional imprisonment, such additional imprisonment to cease when the fine is paid or is recovered by process of law.

Spankie, J. —I concur with the Hon'ble Chief Justice on the propriety of the conviction under s. 165, and in the sentence proposed. The conviction of accused and sentence passed by the Sessions Judge under s. 29 of Act V of 1861 is annulled, and the prisoner is convicted under s. 165 of the Indian Penal Code, and a warrant must issue accordingly.

[1 ALL. 535]
APPELLATE CIVIL.

The 18th December, 1877.

PRESENT :

MR. JUSTICE SPANKIE, AND MR. JUSTICE OLDFIELD.

Hasan Ali and another.....Plaintiffs

versus

Mehdi Husain and others.....Defendants.*

Muhammadan Law—Inheritance—Minor—Justice, equity, and good conscience—Act VI of 1871 (Bengal Civil Courts' Act), s. 24.

H, being in possession of certain real property on her own account, and on account of her nephew and niece, minors, of whose persons and property she had assumed charge in the capacity of guardian, sold the property, in good faith, and for valuable consideration in order to liquidate ancestral debts, and for other necessary purposes and wants of herself and the minors. Held that, under Muhammadan law and according to justice, equity, and good conscience, the sales were binding on the minors.

THIS was a suit for possession of certain shares in a dwelling-house and in certain villages, by cancellation of sales of the property. The plaintiffs were respectively the son and daughter of one Najib Husain, who died in 1857. At the time of his death the plaintiffs were minors, and, their mother being also dead, Husaini Bibi, their father's only sister, assumed charge of their persons and their property in the capacity of guardian. Najib Hussain and Husaini Bibi had inherited from their father a dwelling-house and certain shares in six villages, which property was heavily mortgaged. On the 3rd January 1862, the plaintiffs being minors at the time, [534] Husaini Bibi sold the dwelling-house to her paternal uncle, defendant in this suit, and the shares in the six villages to her cousins, also defendants in this suit. These sales were made by her in good faith, and for valuable consideration, in order to liquidate ancestral debts, and for the benefit of the plaintiffs. The plaintiffs sought in the present suit to set aside these sales. The Court of First Instance dismissed the suit, holding that, under Muhammadan law and according to justice, equity, and good conscience, the sales were binding on the plaintiffs. On appeal by the plaintiffs the lower Appellate Court concurred in the ruling of the Court of First Instance.

On special appeal by the plaintiffs to the High Court it was contended by them that, inasmuch as Husaini Bibi was not their legal guardian, she had no power to make contracts on their behalf, and the sales were invalid.

Pandit Bishambhar Nath, for the Appellants.

Mr. Colvin and Shah Asad Ali, for the Respondents.

The Judgment of the Court, so far as it is material for the purposes of this report, was as follows :—

We may, however, observe that we should be disposed to accept the Judge's finding on the merits. Even if the plea, that Musammat Husaini was

* Special Appeal, No. 860 of 1877, from a decree of M. Brodhurst, Esq., Judge of Benares, dated the 1st May 1877, affirming a decree of Pandit Jagat Narain, Subordinate Judge of Jaunpur, dated the 4th June 1875.

not the legal guardian of the appellants when she made the sales, was good, we think that the plea is not one to be taken in special appeal for the first time; no such objection was made below; and further it does not appear that the plaintiffs came into Court offering their shares of the ancestral debts on account of which the sales were effected.* On the contrary, they denied any necessity for sale, and seek to repudiate the transactions. But we are not satisfied that we are not within Muhammadan law in this case [*Hamir Singh v. Zakia* (I. L. R., 1 All., 57)]. We must look to the position of the parties, the circumstances of the case, and the facts found by the Judge. Musammat Husaini was one of the heirs of the property, and was manager on behalf of the children—her nephew and niece. Their father and mother had died, and there was no one to take care of the orphans. The father had been in straitened circumstances before his death. The debts [586] of deceased had to be satisfied. Their discharge is a matter of necessity, and as observed in the Full Bench decision quoted above *Hamir Singh v. Zakia*, (I. L. R., 1 All. 57), the right of the heirs is connected with the estate on the sole condition of its being free from incumbrance. Musammat Husaini was in possession of the property, whatever it was, on her own account, and on behalf of the minors, and, in that character, it would seem that she could act for them. In about five years after his death she was compelled to sell the property covered by the deeds of sale, the landed portion of which was already mortgaged for more than Rs. 3,000 to satisfy the debts and for other necessary family purposes and wants. She thus was enabled to bring up the children and maintain and marry them. Whatever she did was done openly, and the Judge has found that the consideration was duly paid, that the sales were effected to pay the ancestral debts and that they were paid to meet pressing necessity for the benefit of the minors. Under these circumstances, we agree with the lower Appellate Court that the Muhammadan law and principles of equity and justice are binding on the plaintiffs who have not in their petition of plaint assigned any reason or grounds for repudiating the act of Musammat Husaini.

With these observations, which go to all the pleas in appeal, we dismiss the appeal and affirm the judgment of the lower Appellate Court with costs.

Appeal dismissed.

NOTES.

[MAHOMEDAN LAW—SALE BY A DE FACTO GUARDIAN—

(1) For discharging debts of the deceased :—

Such sales were held valid : (1902) 26 Mad., 734 (739); (1903) 26 All., 22.

But not when such debts had not been adjudged : (1895) 20 Bom., 199.

(2) For family purposes :—

The soundness of the decision in the main case was doubted so far as the binding nature of the sale for family purposes was concerned, in (1902) 26 Mad., 734 (739).

See also 34 Cal., 36, 65; and also 11 C. W. N., 71.]

* *Pana Ali v. Sadik Hossein*, H. C. R. N.-W. P., 1875, p. 201; *Sahjee Ram v. Abdul Rahman*, H. C. R., N.-W. P., 1874, p. 268.

[1 All. 536]

APPELLATE CIVIL.

The 19th December, 1877.

PRESENT :

MR. JUSTICE PEARSON, AND MR. JUSTICE SPANKIE.

Wali-ul-la.....Plaintiff

versus

Ghulam Ali.....Defendant.*

Reference to arbitration—Form of oath—Power of arbitrator to administer oath other than in prescribed form—Validity of awards based upon evidence taken on oath illegally administered—Act X of 1873 (Indian Oaths Act) ss. 8, 10, 13—Act XLV of 1860 (Indian Penal Code), s. 20—Act I of 1872 (Indian Evidence Act), s. 3—Special appeal—Objection.

The matters in dispute in a suit were, by the desire of the parties to the suit, referred to arbitration. During the investigation of these matters by [536] the arbitrators the plaintiff offered to be bound by the oath of the defendant administered on the Koran. The defendant agreed to take such oath and such oath was accordingly administered to him by the arbitrators, and his evidence taken, and an award made based on the evidence so taken. On special appeal to the High Court by the plaintiff, he objected for the first time, the objection not having been taken in his memorandum of special appeal, that the arbitrators were not legally competent to administer such oath, and the evidence so taken could not form a valid basis of an award, and the award was therefore void.

Held per PEARSON, J., SPANKIE, J., dissenting, with reference to the legal competency of the arbitrators to administer the oath, that the objection was good, and that the arbitrators had no power to administer the oath.

Per PEARSON, J., SPANKIE, J., doubting, that as the objection was one which vitally affected the procedure of the arbitrators it could not be ignored, although it was not preferred in the lower Courts, and was not to be found in the memorandum of special appeal.

Per PEARSON, J., that the statement of the defendant made on an oath illegally administered could not form a valid basis of an award, and the award was void and should be set aside.

Per SPANKIE, J., that the plaintiff having offered to be bound by the oath and the defendant having agreed to take it, the plaintiff was bound by the evidence given on such oath, and that as the arbitrators had by law and consent of parties, authority to receive the evidence of the defendant, the substitution by them of an oath on the Koran for an affirmation did not under the provisions of s. 18† of Act X of 1873, invalidate such evidence and consequently render the award based on such evidence void.

* Special Appeal, No. 878 of 1877, from a decree of Maulvi Abdul Majid Khan, Subordinate Judge of Shahjahanpur, dated the 16th May 1877, affirming a decree of Babu Brijpal Das, Munshi of Shahjahanpur, dated the 26th March 1877.

†[Sec. 18 :—No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.]

THIS was a suit for the recovery of money in which, by the desire of the parties to the suit, the matters in difference between them were referred to arbitration by the Munsif. During the investigation of these matters by the arbitrators the plaintiff offered to be bound by the defendant's oath administered on the Koran. The defendant agreed to take such oath, and the arbitrators administered it to him, and made an award in accordance with his evidence taken by them on such oath. The plaintiff applied to the Munsif to set aside the award for reasons which it is unnecessary for the purposes of this report to state. The Munsif refused this application, and gave judgment according to the award. On appeal by the plaintiff to the Subordinate Judge, when he again contended that the award should be set aside for the reasons stated by him in the Court of First Instance, the Munsif's decree was affirmed. The plaintiff then appealed to the High Court, where he contended, among other things, for the first time, the contention not being raised in his [587] memorandum of special appeal, that the arbitrators were not legally competent to administer the oath to the defendant, and that the defendant's evidence taken on such oath could not form a valid basis of an award, and the award was consequently void and should be set aside.

Mr. Colvin and Pandit Nand Lal, for the Appellant.

Munshi Kashi Prasad and Shah Asad Ali, for the Respondent.

Pearson, J. (After disposing of the pleas set forth in the memorandum of appeal continued):--A far more serious objection to the procedure of the arbitrators has been here orally urged by the learned counsel for the appellants, viz., that the arbitrators were not legally competent to administer the oath to the respondent under s. 10¹ of Act X of 1873, which only empowers a Court to administer such an oath as is mentioned in s. 8 thereof. The arbitrators were persons authorised by law to take evidence, and for that purpose to put witnesses upon oath or affirmation according to the provisions of the law for the examination of witnesses, but they do not constitute a Court, and are not empowered to administer an oath of the nature mentioned in s. 8 of the Oaths Act. Their proceeding in administering such an oath to the respondent in this case was therefore invalid, as being without warrant of law, and consequently his statement, made on an oath so illegally administered, cannot form a valid basis of an award. I am constrained to admit the strength of this objection, which being one vitally affecting the arbitrators' procedure cannot, I think, be ignored by us, although it was not preferred in the lower Courts, and is not to be found in the memorandum of special appeal. I would decree the appeal, set aside the decree of the lower Courts and the award in conformity with which it has been passed, and remand the case to the Court of First Instance for fresh disposal, under s. 351 of Act VIII of 1859, with an instruction that the costs of the litigation up to this time should follow the event.

Spankie, J.--The objection which my honourable colleague would admit was never urged in the first Court, nor in appeal. It is not even one of the pleas in the memorandum of special appeal in this Court. It was raised for the first time at the hearing of the appeal. I am doubtful whether we should entertain the objection. The lower Appellate Court disposed of all the pleas taken by the appellant, and its [588] judgment and that of the first Court was in accordance with the award. Assuming that the learned counsel was at liberty to take the

* [See, 10 :--If such party or witness agrees to make such oath or affirmation, the Court Administration of oath may proceed to administer it, or if it is of such a nature that it if accepted. issue a commission to any person to administer it, and authorise him to take the evidence of the person to be sworn or affirmed and return it to the Court.]

plea, I would reject it because there is no question that the appellant offered to abide by the defendant's oath on the Koran, that his offer was contained in a written petition to the arbitrators and accepted by the defendant. He was bound by his agreement, made with the free consent of both parties, competent to make it, and for a lawful object, *viz.*, the ascertainment of the truth by means which the petitioner, plaintiff, considered most likely to be successful, and which the defendant accepted. The plaintiff, in my opinion, should be held bound by the evidence of the defendant, given under an obligation imposed upon him, and fulfilled in the manner required by the plaintiff himself. But going beyond this, I would say that I do not find that there is any section in Act X of 1873 which would make it unlawful for the arbitrators to administer an oath on the Koran to a party willing to be sworn upon it. It is conceded that arbitrators are authorised to administer an oath; they are also persons, if the Oaths Act applies to them, who by that Act are "persons having by consent of parties authority to receive evidence." They, however, are not a Court within the meaning of s. 8^{*} of the Act. A Court of Justice includes a Judge empowered by law to act judicially alone, or a body of Judges empowered by law to act judicially as a body, when the Judge or body of Judges is acting judicially—s. 20 of the Indian Penal Code. Moreover, the Indian Evidence Act thus defines the meaning of the Court which receives the evidence in the judicial proceeding referred to in s. 8 of the Oaths Act. "Court" includes all Judges, Magistrates and all persons, *except arbitrators*, legally authorised to take evidence—s. 3. I am therefore disposed to conclude that s. 8 refers to parties and witnesses in every judicial proceeding actually before the Court for the purpose of giving evidence, or who may offer through their representatives actually before the Court to give evidence in any form held binding by them. But I am not prepared to extend the section to arbitrators, who do not appear to be fettered by the Act or bound to communicate the offer of a party or witness to be sworn in any particular form to the referring Court for sanction. It seems to me that if arbitrators are not lawfully empowered by the Oaths Act to do what a Court is empowered to do by s. 8, their act in administering [539] an oath or affirmation to any witness in any form "common amongst or held binding by persons of the same race or persuasion to what he belongs and not repugnant to justice or decency, or not purporting to affect a third person" is covered by s. 13, in which there is not only no exclusive mention of the term Court, but in fact the word is not to be found there at all. The section which is in a different chapter from s. 8 runs thus: "No omission to take any oath, or make any affirmation, *no substitution* of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding, or render inadmissible any evidence whatever, in or in respect of which such omission, substitution, or irregularity took place, or shall affect the obligation of the witness to state the truth." If the arbitrators in this case were authorised to affirm witnesses in the manner now in force in our Courts, and they substituted an oath on the Koran by request of one of the parties assented to by the other party, the substitution, under s. 13 of the Act, does not invalidate the evidence, and therefore does not render void the award founded on that evidence. I therefore would affirm the judgment of the lower Appellate Court, and dismiss the appeal with costs.

Appeal dismissed.

* [Sec. 8.—If any party to, or witness in, any judicial proceeding offers to give evidence

Power of Court to tender on oath or solemn affirmation in any form common amongst, or certain oaths. held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him.]

[1 ALL. 539]

APPELLATE CIVIL.

The 2nd January, 1878.

PRESENT:

MR. JUSTICE PEARSON AND MR. JUSTICE SPANKIE

Madho Das.....Plaintiff

versus

Kamta Das.....Defendant.*

Saniasi—Inheritance—Guru—Chela.

Among Saniasis generally no *chela* has a right as such to succeed to the property of his deceased *guru*. His right of succession depends upon his nomination by the deceased in his lifetime as his successor, which nomination is generally confirmed by the *mahants* of the neighbourhood assembled together to perform the funeral obsequies of the deceased. Where a *guru* does not nominate his successor from among his *chelas*, such successor is elected and installed by the *mahants* and principal persons of the sect in the neighbourhood upon the occasion of the funeral obsequies of the deceased. *Nirunjan Barthee v. Padaruth Barthee* (S. D. A., N.-W. P., 1864, vol. i, 512) followed.

Where therefore a *chela* sued for possession of a village belonging to his deceased *guru*, founding such suit on his right of succession as *chela* without alleging that he had been nominated by the deceased as his successor [540] and confirmed, or that he had been elected as successor to the deceased, such suit was held to be unmaintainable.

THIS was one of two suits against one Kamta Das for possession of a certain village. These suits were brought by Madho Das and Gopal Das respectively, and both were founded on the plaintiff's right of succession to the property of Paras Ram, deceased, as his *chela* or disciple. Kamta Das, defendant in these suits, alleged that the village had been presented to his *thakur dwara* at Ajudhia by the deceased. The Court of First Instance held that the defendant's allegation was not proved, and that Gopal Das, being the sole disciple of Paras Ram, was entitled to the property in suit, and gave him a decree, and dismissed Madho Das' suit. On appeals by Madho Das and the defendant respectively, the lower Appellate Court concurred with the Court of First Instance in thinking that the defendant's allegation was not proved, but held that, as Madho Das was the senior disciple of Paras Ram, he had a preferential title to the property in suit. It, however, dismissed Madho Das' appeal, and allowed that of the defendant, as it held that both suits were unmaintainable, on the ground that neither of the plaintiffs had declared himself to have been chosen *mahant*, or elected such after the death of Paras Ram, nor had it been shown what was the custom of succession in regard to the shrine belonging to Paras Ram. Both the plaintiffs appealed to the High Court, each contending that having proved his right of succession it was not necessary to consider whether there had been a selection of a successor by Paras Ram or an installation by *mahants* after his death, and that if the decision of the Court of

* Special Appeal, No. 936 of 1877, from a decree of Maulvi Sultan Husan, Subordinate Judge of Gorakhpur, dated the 30th June 1877, affirming a decree of Maulvi Muhammad Kamil, Munsif of Basti, dated the 31st March 1877.

First Instance was defective in this respect, the lower Appellate Court should itself have ascertained what was customary.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the Appellant.

The Senior Government Pleader (*Lala Juala Prasad*) and Maulvi *Mehdi Hasan*, for the Respondent.

The Judgment of the Court was delivered by

Spankie, J., who, after stating the facts, continued :—With reference to former precedents of the late Sudder Dewanny Adawlut of these Provinces, we cannot say that the Subordinate Judge was in error in dismissing both claims for the reasons assigned by him, since it was not for him to make out a title which neither plaintiff alleged [541] for himself as his ground of action. But he was right in noticing the defect, because it had been pleaded by the defendant in appeal.

It has been laid down by the late Sudder Dewanny Adawlut * that amongst the general tribe of fakirs called Saniasis (and the plaintiffs here appear to be of the description) a right of inheritance strictly so speaking to the property of a deceased *guru* or spiritual preceptor does not exist ; but the right of succession depends upon the nomination of one amongst his disciples by the deceased *guru* in his own lifetime, which nomination is generally confirmed by the *mahants* of the neighbourhood assembled together for the purpose of performing the funeral obsequies of the deceased. Where no nomination has been made the succession is elective, the *mahants* and the principal persons of the sect in the neighbourhood choosing from amongst the disciples of the deceased *guru* the one who may appear to be the most qualified to be his successor, installing him then and there on the occasion of performing the funeral ceremonies of the late *guru*.

Neither plaintiff avers that he was nominated by the deceased Paras Ram during his life and confirmed afterwards, nor does either assert that in consequence of Paras Ram's omission to nominate a successor, he had been elected after the latter's death by the neighbouring *mahants* and members of the sect ; but both plaintiffs have based their claim on inheritance and discipleship, which would not be sufficient to establish a right of succession. We therefore dismiss the appeal and affirm the judgment of the lower Appellate Court with costs.

Appeal dismissed.

* In *Nirunjun Barthee v. Padaruth Barthee*, S. I. A., N. W.-P., 1864, vol. i, 512.

[1 All. 541]

APPELLATE CIVIL.

The 2nd January, 1878.

PRESENT:

MR. JUSTICE SPANKIE AND MR. JUSTICE OLDFIELD.

Jeoni.....Plaintiff

versus

Bhagwan Sahai and another.....Defendants.*

*Act VIII of 1859 (Civil Procedure Code), s. 246—Effect of order under s. 246—
Suit to establish right—Limitation.*

B caused a certain dwelling-house to be attached in execution of a decree held by him against M as the property of M. J preferred a claim to the property, which was disallowed by an order made under s. 246 of Act [542] VIII of 1859. Two days after the date of such order M satisfied B's decree. More than a year after the date of such order J sued B and M to establish her proprietary right to the dwelling-house alleging that M had fraudulently mortgaged it to B. Held, following the Full Bench ruling in *Budri Prasad v. Muhammad Yusuf* (I. L. R., 1 All., 381), that J having failed to prove her right within the time allowed by law, was precluded from asserting it by the order made under s. 246 of Act VIII of 1859, and that whether or not the decree was satisfied after the order was made, the effect of the order was the same.

THIS was a suit to establish the plaintiff's proprietary right in a certain dwelling-house, instituted on the 22nd of February 1876. The cause of action was stated in the plaint to be the fraudulent mortgage of the house to Bhagwan Sahai, defendant in the suit, by the plaintiff's husband, also a defendant in the suit, which mortgage the plaintiff alleged she became aware of in February 1874. Bhagwan Sahai set up as a defence to the suit, among other matters, that he had caused the house to be attached in execution of a decree held by him against the plaintiff's husband as the property of her husband, that the plaintiff had then preferred a proprietary claim to the house, which was disallowed by the Court executing the decree by an order made under the provisions of s. 246 of Act VIII of 1859 on the 14th November 1874, and that, as the present suit to establish the plaintiff's right to the house was brought more than a year after the date of such order, it was barred by limitation. The Court of First Instance dismissed the suit as barred by limitation. On appeal by the plaintiff the lower Appellate Court also held that the suit was barred by limitation, overruling her contention that the order made under s. 246 of Act VIII of 1859 did not affect her suit, inasmuch as Bhagwan Das' decree had been satisfied two days after the order had been made, and that it was only in the case of a sale that such an order would affect a suit brought to establish a claim rejected by it.

On appeal by the plaintiff to the High Court it was again contended by her that, as the decree in execution of which the property in suit was formerly attached was satisfied within two days after the order of the 14th November

* Special Appeal, No. 1042 of 1877, from a decree of W. C. Turner, Esq., Officiating Judge of Meerut, dated the 28th July 1877, affirming a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 11th September 1876.

1874, made under s. 246 of Act VIII of 1859, was passed, there was no necessity to bring a suit for the establishment of her right, and that order was no bar to the suit.

[543] Pandit Ajudhia Nath and Babu Oprokash Chandar for the Appellant.

Munshi Hanuman Prasad and the Junior Government Pleader (Babu Dwarka Nath Banarji), for the Respondents.

The Judgment of the High Court, so far as it related to this contention, was as follows:—

Spankie, J.—The first plea would fail if he hold that the suit should have been brought within one year from the date of the order passed under s. 246 of Act VIII of 1859. For it is the order then made which, if contested at all, must be contested within one year, and after that date cannot be questioned. The Full Bench decision of this Court in *Badri Prasad v. Muhammad Yusuf* (I. L. R., 1 All., 381) has conclusively settled this point. Whether the decree was settled after the order was made has no bearing on the point at issue. Having examined the record of this case and the order made under s. 246, Act VIII of 1859, there cannot be a doubt that the plaintiff was, and now is, entirely bound by that order, and that she cannot now re-assert her title to the house, which was not allowed as against the judgment-debtor and decree made in 1874.

[1 All. 543]

APPELLATE CIVIL.

The 2nd January, 1878.

PRESENT:

MR. JUSTICE SPANKIE AND MR. JUSTICE OLDFIELD.

Lachman Singh and another.....Defendants

versus

Sanwal Singh.....Plaintiff.*

Act VIII of 1859 (Civil Procedure Code), s. 7—Relinquishment or omission to sue for any part of claim—Fraud—Cause of action.

S, as one of the heirs of his brother M, sued the sons of M, the other heirs of M, for, amongst other things, a declaration of his right to share in the rights and interests of M, as the mortgagee, under a deed of mortgage which he valued at the principal sum advanced under the mortgage, viz., Rs. 5,600, stating his cause of action to be the obstruction caused by the sons of M to his sharing in M's estate. He obtained a decree declaring his title to the share

* Special Appeal, No. 1043 of 1877, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 11th June 1877, affirming a decree of Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 22nd July 1876.

claimed. *L*, one of the sons of *M*, had fraudulently concealed from and kept *S* in ignorance of the fact that previously to the suit he had [544] realised Rs. 8,624 under the mortgage. On this fact coming to *S*'s knowledge he sued the sons of *M* to recover his share of that sum. Held that the second suit was not barred by s. 7 of Act VIII of 1859. *Bulwant Singh v. Chittan Singh* (H. C. R., N.-W. P., 1871, p. 27) followed and observed on.

THIS was a suit for Rs. 2,540-11-0, being the plaintiff's share of the moneys recovered by Lachman Singh, a defendant in the suit, on a deed of mortgage, dated the 14th February 1871, together with interest thereon. The plaintiff in the suit was the brother of Manohar Singh, deceased, the mortgagee, and he and his brother and his brother's sons were members of a joint and undivided Hindu family. In 1874, after Manohar Singh's death, the plaintiff, as one of the heirs of Manohar Singh, sued his nephews to establish his right to a share in Manohar Singh's estate, including in that suit a claim to share in the rights and interests of Manohar Singh under the deed of mortgage, valuing such rights and interests at Rs. 5,600, the principal sum. He obtained a decree in that suit which declared, amongst other things, his right to the share claimed. After obtaining this decree it came to the plaintiff's knowledge that Lachman Singh had in 1873 realised from the mortgagor Rs. 8,624, being the original debt due under the mortgage together with interest, a fact which Lachman Singh had fraudulently concealed from and kept him in ignorance of. He therefore brought the present suit to recover from his nephews his share of that sum. Lachman Singh, on his own behalf and on behalf of his minor brother, set up as a defence to the suit, amongst other matters, that the suit was barred by the provisions of s. 7 of Act VIII of 1859. The Court of First Instance, refusing to admit this defence, gave the plaintiff a decree which, on appeal by the defendants, the lower Appellate Court affirmed.

The defendants then appealed to the High Court, again contending that the suit was barred by s. 7 of Act VIII of 1859.

Pandits *Bishambhar Nath* and *Nand Lal* for the Appellants.

The Junior Government Pleader (*Babu Dwarka Nath Banarji*) for the Respondent.

The Judgment of the Court was delivered by

Oldfield, J.—The plaint in the former suit is badly drawn up, but the claim, so far as the mortgage-debt is concerned, was clearly [545] for a declaration that the plaintiff was entitled to a fifth share in the sum lent under the mortgage-deed. The plaintiff stated the principal sum to be Rs. 5,600, and his own share in that sum Rs. 1,120. He did not sue to recover any portion of the debt. He claimed by right of succession, and his cause of action was the obstruction offered by the defendants to his possession of the family estate. It appears that at the time he instituted the first suit the defendant had realised the original debt with interest to the amount of Rs. 8,624. The plaintiff had no knowledge of this fact which was concealed from him; and he now sues to recover his share of that sum. We find that the defendant wrongfully appropriated the assets of the estate, and the Judge's finding is to the effect that he dishonestly concealed from the plaintiff information that he had realised the debt. We have thus the element of fraud introduced into the transaction and giving another cause of action to that on which the former suit was brought. We concur with the Judge in holding that, under the circumstances, s. 7 of Act VIII of 1859 cannot be applicable to bar this suit. We notice that a similar view was taken by this Court in *Bulwant Singh v. Chittan*

*Singh,** and without endorsing or accepting all that is in that judgment, we consider that it expresses the course that we should adopt in this case. We dismiss the appeal with costs.

Appeal dismissed.

[1 All. 546]

APPELLATE CIVIL.

The 2nd January, 1878.

PRESENT:

MR. JUSTICE PEARSON AND MR. JUSTICE OLDFIELD.

Durga Prasad.....Plaintiff

versus

Khairati and others.....Defendants.†

*Act VIII of 1859 (Civil Procedure Code), ss. 337, 351—Act XXIII of 1861,
s. 37—Appeal—Appellate Court, powers of.*

An Appellate Court, hearing an appeal *ex parte* in the absence of the respondent, cannot, *suo motu*, raise points in favour of the respondent, but must confine its decision to the questions raised by the appellant.

[546] THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the plaintiff in this suit appealed against the order of the lower Appellate Court remanding the suit to the Court of First Instance for a new trial. The plaintiff contended in special appeal that the order of remand was unauthorised by law.

Munshi Hanuman Prasad for the Appellant.

The Respondents did not appear.

The Judgment of the High Court, so far as it related to this contention, was as follows:

Oldfield, J.—It appears that the defendants, respondents, executed a deed of mortgage in favour of plaintiff on the 9th June 1873, for a consideration of Rs. 1,000, which was payable in one year, and the purport of the deed is to give possession to the plaintiff. On the same date another deed was executed

* H. C. R., N.-W. P., 1871, p. 27. For a case in which the omission was due to a *bona fide* mistake, and it was held, following *Buzdoor Ruheem v. Shamsunnissa Begum*, 8 W. R., P. C., 3, that the result was the same as if there had been an act of deliberate relinquishment, see *Ganes Chandra Chowdhury v. Ram Kumar Chowdhury*, 8 B.L. R., A. C., 265; S. C., 12 W. R., 79.

† Special Appeal, No. 995 of 1877, from a decree of W. Lane, Esq., Officiating Judge of Moradabad, dated the 10th May 1877, reversing a decree of Maulvi Wajib-ul-lah Khan, Subordinate Judge of Moradabad, dated the 21st January 1875.

by which the defendants agreed to take a lease of the property on payment of rent, for the due payment of which the property was hypothesized in the deed. The rent not having been paid, the plaintiff sues to recover arrears of rent, principal and interest, Rs. 164-7-1, by enforcing the charge on the property, together with interest, subsequent to institution of the suit, and to obtain possession of the mortgaged property. The defendants appeared in the Court of First Instance by their pleader and asked for an adjournment to enable them to put in their defence; this was refused, and they failed to put in any reply to the claim, and the Court of First Instance decreed the claim for possession, and the principal amount of rent, and dismissed the claim for interest. The plaintiff then preferred an appeal to the Judge on the matter of interest. The defendants did not defend the appeal notwithstanding that the Judge summoned them to appear in person. The Judge has held that, under s. 37^{*} of Act XXIII of 1861, he is at liberty to open the whole case on the appeal preferred by the plaintiff, and as he considered the Court of First Instance was not justified in refusing to allow time to the defendants to prepare their answer to the suit, and also that, looking into the deeds, there is reason to think that the claim to be put in possession of the mortgaged property is not maintainable, and that the second deed is invalid for want of registration, he has reversed the decree of the first Court and remanded the suit for [547] re-trial on the merits, under s. 351 of Act VIII of 1859. This decision is open to the objection taken on special appeal.

Section 37^{*} of Act XXIII of 1861 gives the Appellate Court the same powers in cases of appeal which are vested in the Courts of original jurisdiction in respect of original suits. But the Judge's order cannot be supported under this section. He has held that there has been an improper consideration and admission of evidence affecting the merits of the claim, although these matters were never put in issue in the appeal before him. The Judge should have confined himself to deciding the matters put in issue by the parties. Section 337[†] of Act VIII of 1859 shows the circumstances under which a Court may reverse or modify a decree in favour of plaintiffs or defendants who have not appealed, but this section does not apply to the case before us. The defendants might have appealed or preferred objections under s. 348, and in that case the Judge would have had to decide the questions raised, but they never appeared to defend the appeal, and, we may add, have not done so in this Court. The only question before the Judge was that raised by the appellant, the plaintiff, and he should have confined his decision to that question.

Appellate Court to have same powers as Courts of original jurisdiction.

One of several plaintiffs or defendants may appeal and obtain a reversal of the whole decree if it proceed on a ground common to all.

* [See. 37 :—Unless when otherwise provided, the Appellate Court shall have the same powers in cases of appeal which are vested in the Courts of original jurisdiction in respect of original suits.]

† [See. 337 :—If there be two or more plaintiffs or two or more defendants in a suit, and the decision of the lower Court proceed on any ground common to all, any one of the plaintiffs or defendants may appeal against the whole decree, and the Appellate Court may reverse or modify the decree in favour of all the plaintiffs or defendants.]

[1 All. 547]

APPELLATE CIVIL.

The 2nd January, 1878.

PRESENT :

MR. JUSTICE PEARSON AND MR. JUSTICE OLDFIELD.

Umrao Begam.....Judgment-debtor

versus

The Land Mortgage Bank of India.....Decree-holder.*

Act XVIII of 1873 (North-Western Provinces Rent Act), s. 9—Landholder—Right of occupancy tenant—Transfer of right of occupancy in execution of decree.

Section 9 of Act XVIII of 1873 does not prevent a landholder from causing the sale in execution of his own decree of the occupancy-right of his own judgment-debtor in land belonging to himself. *Ablakh Rai v. Udit Narain Rai* (I. L. R., 1 All., 353) distinguished.

THE proprietary rights of the judgment-debtor in the village of Sikandarpur were sold on the 23rd October 1876, and were [548] purchased by the decree-holder. The decree-holder now applied for the sale of the right of occupancy acquired by the judgment-debtor, under the provisions of s. 7 of Act XVIII of 1873, in the *sir* land appertaining to such proprietary rights. The judgment-debtor objected that, under the provisions of s. 9 of that Act, such right of occupancy was not transferable. The Court of First Instance overruled this objection on the ground that the provisions of s. 9 of Act XVIII of 1873 were not applicable to sales in execution of decrees, but to voluntary transfers.

On appeal by the judgment-debtor to the High Court, it was again contended by her that her right of occupancy in the *sir* land as an ex-proprietor could not be sold in execution of decree under the provisions of s. 9 of Act XVIII of 1873.

Babu Beni Prasad, for the Appellant.

Pandit Ajudhia Nath, for the Respondent.

The Judgment of the High Court was delivered by

Pearson, J.—The lower Court's view that s. 9 of the Rent Act applies to private transfers of occupancy-rights only and not to sales of such rights in execution of decree is, in the general form in which it is stated, opposed to the Full Bench ruling of this Court, dated 19th February 1877 (in *Ablakh Rai v. Udit Narain Rai*, I. L. R., 1 All., 353). But in the case out of which that ruling arose the person who sought to bring to sale an occupancy right possessed by his judgment-debtor in a holding was not the zamindar, the proprietor of the land. In the present case the decree-holder is himself the zamindar. The section appears to have been enacted in the interest of landholders, who may presumably waive the privilege it confers on them. It would be unreasonable to hold that a landholder should not be free to cause the sale in execution of his own decree of the occupancy right of his own judgment-debtor in land

* Miscellaneous Regular Appeal, No. 96 of 1877, from an order of Pandit Har Sahai, Subordinate Judge of Farukhabad, dated the 27th August 1877.

belonging to himself. Such a case cannot fall within the scope of the Full Bench ruling above mentioned. We therefore dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[**Affirmed** by the F. B., in (1879) 2 All., 451. See also (1885) 7 All., 511.]

[549] APPELLATE CIVIL.

The 2nd January, 1878.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR. JUSTICE PEARSON.

Kanahi Ram.....Plaintiff

versus

Biddya Ram.....Defendant.*

Hindu Law—Guardian and minor—Act XXI of 1850—Caste—Marriage—Medical examination.

A Hindu who has been deprived of caste by the members of his brotherhood on account of intending, for a money-consideration, to give his infant daughter in marriage to a man both old and impotent, does not, under Hindu Law, thereby forfeit his right as guardian to the custody of such daughter. Even if there were a rule of Hindu Law which, in such a case, inflicted a forfeiture of such right, such rule could not, with reference to the provisions of Act XXI of 1850, be enforced.

Where accordingly, because a Hindu had been deprived of caste for the reason above-mentioned, a person sued to have the custody of the infant himself as her guardian in lieu of her father, and, as such, to be declared empowered to arrange for her marriage to a suitable husband, basing his suit on Hindu Law, held that such suit was not maintainable.

Held also that the lower Courts properly refused to cause the intended husband in this case to be medically examined as to his alleged impotency, he not being a party to the suit, and there being no provision of law authorising such a procedure.

THIS was a suit for possession of Ram Piari, minor daughter of the defendant. The plaintiff stated that the defendant desired, contrary to Hindu Law, to give his daughter in marriage to a very old and impotent man, having taken Rs. 400 from him; that the members of his caste had deprived the defendant of caste, and he had thereby lost his right to the protection of his daughter and to give her in marriage, which right had accrued to the plaintiff, the son of the defendant's uncle; and the plaintiff claimed an injunction restraining the intended marriage, and a declaration of his right to give the defendant's daughter in marriage to a fit and proper person. The Court of First Instance dismissed the suit as unmaintainable, and on appeal by the plaintiff the lower Appellate Court affirmed the decree of that Court.

* Special Appeal, No. 560 of 1877, from a decree of G. E. Watson, Esq., Judge of Aligarh, dated the 14th May 1877, affirming a decree of Munshi Man Mohan Lal, Munsif of Aligarh, dated the 11th May 1877.

[560] On special appeal by the plaintiff to the High Court it was contended that the suit was maintainable, and that the lower Courts had improperly rejected the plaintiff's application to have the intended husband examined by the Civil Surgeon, in order that it might be ascertained whether or not he was physically fit for marriage.

Pandits Ajudhia Nath and Nand Lal, Lala Harkishen Das, and Babu Oprokash Chandar, for the Appellant.

The Junior Government Pleader (Babu Dwarka Nath Banarji) and Munshi Hanuman Prasad, for the Respondent.

The following **Judgments** were delivered by the Court :—

Pearson, J.—This case has been argued before us at great length, and the conclusion at which I have arrived, after consideration of all that has been said on both sides, is that the suit as brought is not maintainable. The appellant has, in my opinion, failed to show that, because the defendant has been put out of caste by the members of his brotherhood on account of his intending to give his infant daughter, aged eleven years, in marriage to a man by name Phunda Ram, said to be more than seventy years old and impotent, in consideration of receiving from him about Rs. 400, he (the defendant) has, according to Hindu Law, lost his right as guardian to the custody of the said girl; and such a contention, even were it supported by Hindu Law, must be disallowed in reference to the provisions of Act XXI of 1850. The claim on the appellant's part on the basis of that contention to have the custody of the girl himself as her guardian in lieu of her father, and as such to be declared empowered to arrange for her marriage to a suitable husband, cannot therefore be conceded. Assuming that, in a suit properly brought for that purpose, and on proof of Phunda Ram's physical disqualification for marriage, the Courts could interfere so far in the matter as to restrain the defendant from marrying his daughter to that person, it would not be necessary to proceed so much further as to deprive the defendant of his rights or to relieve him of his duties as a father. The lower Appellate Court has held the assertion respecting Phunda Ram's impotency not to be substantiated. It is urged that the lower Courts should have caused Phunda Ram to be examined by the Civil Surgeon, but no provision of law authorising such a procedure has been pointed out. Phunda Ram was not even [561] a party to the suit. It has been stated in the course of the argument before us that under Hindu Law a marriage may be dissolved on the ground of the bridegroom's impotency. If this statement be correct, it is satisfactory to think that, should the defendant insist on carrying out his intention, the girl may, if entitled to claim it, have a remedy at law. Although the appellant may not have been entitled to bring this suit as her guardian or to claim her guardianship, his action in the matter is attributable to commendable motives, and in dismissing his appeal, not without reluctance, I would dismiss it without costs, and in affirming substantially the decrees of the lower Courts, I would modify them in so far as they order the costs of the defendant to be paid by the plaintiff.

Stuart, C. J.—I have taken a little time to consider this case, for I confess I was anxious, if I possibly could, to give the plaintiff the remedy he seeks. In our order of the 13th June last * it is justly remarked "that the marriage of a girl eleven years old to a man of seventy years old is, on the face of it, an immense injury to the girl, and an extreme abuse of the father's authority as

* This was an order granting, under s. 193 of Act VIII of 1859, an injunction restraining the defendant from carrying out the intended marriage, pending the determination of this special appeal.

her guardian," and having heard the case out, in fact and in law, I still adhere to that remark, and I would, if I could, prevent this marriage. But I regret to say that, having fully considered it in all its bearings, as well with respect to the peculiar principles and precepts of the Hindu Law as on the other legal grounds which were maintained at the hearing, I have arrived at the same conclusion as that expressed by Mr. Justice PEARSON. No doubt it would have been better if the old man, Phunda, the would-be-bridegroom, had been a party to the original suit, but it is too late to consider that now, even if he had been prejudiced by the order we now make. So far, however, as he is concerned the result is substantially favourable to him, although I should be glad to learn that the marriage does not take place.

I also agree with Mr. Justice PEARSON that this appeal should be dismissed without costs of the Courts below. I would order each party to bear his own in both.

NOTES.

[See (1878) 28 All., 233.]

[552] FULL BENCH.

The 10th January, 1878.

PRESENT:

SIR ROBERT STUART, KT., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, AND MR. JUSTICE SPANKIE.

Chamaili Rani.....Defendant

versus

Ram Dai.....Plaintiff.*

Act VII of 1870 (Court Fees' Act), ss. 17, 27—1ct VIII of 1859 (Civil Procedure Code), ss. 8, 9—Multifarious suit—"Distinct subjects"—Plaint—Memorandum of appeal.

Held (SPANKIE, J., dissenting) that the words "distinct subjects" in s. 17 of Act VII of 1870 mean distinct causes of action or distinct kinds of relief.

Per SPANKIE, J.—Such words mean every separate matter distinctly forming a subject of the claim.

THE defendant in this suit having preferred an appeal to the High Court against the decree of the Court of First Instance after the time allowed by law, the Court called upon the respondent to show cause why the appeal should not be admitted after such period. The respondent preferred a petition to the Court stating that the memorandum of appeal was insufficiently stamped, the appellant having paid in respect thereof a Court fee of Rs. 610, whereas under s. 17[†] of Act VII of 1870 a fee of Rs. 808-12-0 was chargeable.

*Miscellaneous Application, No. 32 B of 1877.

†[Sec. 17:—Where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act.

Nothing in the former part of this section shall be deemed to affect the power conferred by the Code of Civil Procedure, section nine.]

Under the order of the Court the following report was made by the Assistant Registrar :—

"The claim embraces different subjects, and under s. 17 of the Court Fees' Act, the Court fees should apparently have been calculated on each subject-matter, and not on the aggregate value, as has been done. The fees should be calculated as follows :—

	<i>Court-fees.</i>
	Rs. A. P.
1.—For possession (on five times the jama)	4,815 1 2
2.—For a house, value ...	4,100 0 0
3.—For wasilat ...	5,248 3 2
4.—For damages ...	648 0 0
Total ...	<hr/> 14,906 4 4
	808 12 0

On the aggregate amount the stamp is sufficient, but this apparently is not correct as stated above. It should have been calculated under s. 17 of the Court Fees' Act, and the stamp is therefore insufficient by Rs. 198-12-0."

[553] The Court (STUART, C.J., and SPANKIE, J.) referred to the Full Bench for an opinion as to the meaning of the words "distinct subjects" in s. 17 of Act VII of 1870.

Mr. Colvin and Pandit Ajudhia Nath, for the Appellant.

Munshi Hanuman Prasad, Pandit Bishambar Nath, and Mir Zahur Husain for the Respondent.

The following Judgments were delivered by the Full Bench :—

Stuart, C.J.—It appears to me that the meaning of the words "distinct subjects" in s. 17 of Act VII of 1870 is shown with sufficient clearness in that section itself, when it states that "the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act." This, I think, can only mean that the two or more distinct subjects are to be so chargeable as being distinct causes of action. The words "plaints or memoranda of appeal in suits" in the section show this to my mind conclusively, and it is not enough that the distinct subjects should be merely separate and distinct matters embraced in the claim.

But, on the other hand, I am of opinion that this interpretation of s. 17 of the Court Fees' Act does not in the least degree affect the correctness of the calculation submitted by the office in the case which has given rise to this reference, for it is very clear to me that each of the separate distinct subjects mentioned in the report might be separate causes of action in separate suits, and therefore whether viewed in that light or merely as distinct and separate matters of claim, the correct fee chargeable in this case is that suggested by the Assistant Registrar.

Turner, J.—Seeing that the fee to be charged in such cases is the aggregate of the fees to which the plaints in suits embracing separately each of the subjects would be liable under the Act, I am inclined to think that "distinct subjects" mean distinct causes of action or distinct kinds of relief; e.g., if a suit is brought for the recovery of an inheritance, although the inheritance might consist of distinct properties and properties differing in kind, the fee would be computed on the aggregate value of the one subject of suit. But where a suit is brought

*[q. v. supra, 1 All. p. 562].

(i) for the recovery of an inheritance, (ii) for an injunction, and (iii) for the amount of a bill-of-exchange accepted by the defendant, each of these three subjects would be distinct, and the fee chargeable would be the aggregate of the fees chargeable in respect of each subject if sued for in a separate suit. On the report now submitted by the office it is not possible to determine the proper fee. When the record is before the Court it can be ascertained what are the subjects to which the appeal relates.

Pearson, J.—I concur in the view taken by my learned colleague Mr. Justice TURNER.

Spankie, J.—I adhere to the opinion which I expressed when this question was argued by Pandit Ajudhia Nath before the referring Bench, which opinion I believe the learned Chief Justice shared. But it became necessary to refer the question as a doubt had been expressed elsewhere as to the meaning of the words "distinct subjects" in s. 17 of the Court Fees' Act.

I regard the words as meaning every separate matter distinctly forming a subject of the claim. The section runs thus: "Where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act." The fee to which each of the distinct subjects embraced by the suit is liable, if a separate suit were brought, is first to be ascertained and then the aggregate amount of all the items is to be charged. The words "multifarious suits" in the margin have no reference to s. 8^{*} of Act VIII of 1859 in the sense suggested by the learned pleader for appellant, that we are to read the words "two or more distinct subjects" as if they were "two or more distinct causes of action;" and the second clause in s. 27 that "nothing in the former part of the section shall be deemed to affect the power conferred by the Code of Civil Procedure, s. 9" simply affirms what is laid down in s. 9 that, where two or more causes of action are joined in the same suit, and the Court shall be of opinion that they cannot conveniently be tried together, the Court may order separate trials of such causes of action to be held.

I would reply that the Assistant Registrar has calculated the fees strictly in accordance with the provisions of s. 17 of Act VIII of 1870.

NOTES.

[The rule as to multifarious suits is subject to the maximum in the proviso at the end of Sch. I, No. 1:—(1880) 3 All., 108.

This case was explained in (1880) 2 All., 676, F.B.; see also 16 All., 401; 27 All., 186.]

* [Sec. 8:—Causes of action by and against the same parties, and cognizable by the same Court, may be joined in the same suit, provided the entire claim in respect of the amount or value of the property in suit action in the same suit. do not exceed the jurisdiction of such Court.]

[555] APPELLATE CIVIL.

The 18th January, 1878.

PRESENT:

MR. JUSTICE SPANKIE AND MR. JUSTICE OLDFIELD.

Gumani and another.....Plaintiffs

versus

Ram Charan and others.....Defendants.*

*Contract—Specific performance—Act I of 1877 (Specific Relief Act), s. 27,
cl. (b)—Misjoinder of causes of action.*

The plaintiffs sued to enforce an agreement for the execution of a conveyance of certain immoveable property, and for the possession of such property, making the party to such agreement and the persons who had, subsequently to the date of the same, purchased such property in execution of decree, defendants in the suit, on the allegation that such persons had purchased in bad faith and with notice of the agreement. Held, with reference to s. 27 of Act I of 1877, that, under such circumstances, there was not necessarily a misjoinder of causes of action.

RAM PADARATH and Ram Charan, two brothers, claimed a certain share in a certain village as their joint and undivided property. To enable them to sue for this property, the deceased husband of Gumani and Harbansa advanced them certain moneys. In consideration of the loan, Ram Padarath, on the 7th May 1873, and Ram Charan, on the 10th December 1874, agreed in writing to execute in favour of the deceased a deed of sale of three-fourths of the share should they obtain a decree in respect of it. The brothers sued for possession of the share and obtained a decree. On the 20th June 1876, the rights and interests of Ram Charan in such decree were sold in execution of decree, and were purchased by Nakched and certain other persons. On the 21st August 1876, the rights and interest of Ram Padarath in such decree were sold, and were also purchased by Nakched and the other persons, who obtained possession of the share. Gumani and Harbansa brought the present suit against Ram Charan and Nakched and the other persons to enforce the agreement, dated the 10th December 1874, and for possession of three-fourths of the share. They also brought at the same time a suit against Ram Padarath and Nakched and the other persons to enforce the agreement dated the 7th May 1873. The Court of First Instance dismissed both suits, on the ground that the auction-purchasers were not parties to the agree-[356]ments and there was consequently in the suits a misjoinder of causes of action, and its decrees were on the same ground affirmed by the lower Appellate Court on appeal by the plaintiffs.

On special appeal to the High Court in the present suit it was contended by the plaintiffs that there was no misjoinder of causes of action.

Pandit Ajudhia Nath and Babu Beni Prasad for the Appellants.

Lala Lalta Prasad and Munshi Sukh Ram for the Respondents.

* Special Appeal, No. 1053 of 1877, from a decree of Maulvi Sultan Hasan, Subordinate Judge of Gorakhpur, dated the 13th July 1877, affirming a decree of Shah Rahat Ali, Mansif of Banst, dated the 1st June 1877.

The Judgment of the Court was delivered by

Spankie, J.—We think that the lower Appellate Court has too readily assumed that, because the auction-purchaser was no party to the contract to sell to plaintiff, the suit is bad for misjoinder. It is part of the plaintiff's case that the auction-purchaser at the time of his purchase was aware of the original contract in favour of the plaintiff, and that he and the defendant Ram Charan were acting in collusion and to the injury of the plaintiff. Under cl. (b), s. 27,* Act I of 1877, a contract may be enforced against any party to it or any other person claiming under him by a title arising subsequently to the contract, *except* a transferee for value who has paid his money in good faith and without notice of the original contract. The claim therefore is not necessarily bad for the reason assigned by the lower Courts. The defendants who were parties to the original contracts in the cases before us may be said to have admitted them, as Ram Charan did not defend the suit against him, and Ram Padarath in the other suit acknowledged the justice of the claim. It is true that the auction-purchaser contends that these defendants are in collusion with the plaintiff to injure him.

The Court would have to determine first whether or not there was any agreement enforceable by law between the contracting parties, and, if so, was the contract one specifically enforceable by law as being one for which compensation in money would be no adequate relief. If the lower Appellate Court found that the contract was one specifically enforceable, it would have to determine whether or not it was a contract entered into at the time it professes to have been made in good faith between the contracting parties, or, as alleged by the auction-purchaser, the transaction was [557] not made *bona fide* and was prepared in fraud of himself. If the lower Court found that there was a genuine contract of sale, the Court would then have to determine whether or not the auction-purchaser at the time of his purchase was aware of the original contract.

With this view of the case we annul the finding of the lower Appellate Court, and remand the case, under s. 351 of Act VIII of 1859, with directions that it may be restored to its original number on the file, and be tried on its merits by the lower Appellate Court. Costs will abide the result.

Cause remanded.

Relief against parties and persons claiming under them by subsequent specific performance of a contract may be enforced against—title.

(b) any other person claiming under him by a title arising subsequently to the contract, *except* a transferee for value who has paid his money in good faith and without notice of the original contract.

[1 ALL. 557]

APPELLATE CIVIL.

The 18th January, 1878.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR. JUSTICE OLDFIELD.

Fazal Haq.....Plaintiff

versus

Maha Chand and another.....Defendants.*

Public thoroughfare—Easement—Act XV of 1873 (North-Western Provinces and Oudh Municipalities Act), ss. 27, 32, 38—Special damage—Right of action—Municipal Committee, powers of.

While certain land formed part of a certain public thoroughfare *F* had immediate access to such thoroughfare and the use of a certain drain. The Municipal Committee sold such land to *M* and constructed a new thoroughfare. *M* used and occupied such land so as to obstruct *F*'s access to the new thoroughfare and his use of the drain. *F* therefore sued him to establish a right of access to the new thoroughfare over such land and a right to the use of such drain. Held that, having suffered special damage from *M*'s acts, *F* had a right of action against him, and that such right of action was not affected by the circumstance that *M* had acquired his title to the land from the Municipal Committee, inasmuch as the Municipal Committee could not have dealt with the old thoroughfare to the special injury of *F*, and had in closest the same, would have been bound to provide adequately for his access to the new thoroughfare and for his drainage.

THIS was a suit to establish a right of access to a certain public thoroughfare and to the use of a certain drain, the plaintiff alleging that he had peaceably enjoyed such access and the use of such drain as easements and as of right, without interruption and for twenty years. The facts of the case and the manner in which the lower Courts dealt with the suit are sufficiently stated in the order of [558] remand made by the High Court, to which the plaintiff appealed against the decree of the lower Appellate Court. That decree affirmed the decree of the Court of First Instance dismissing the plaintiff's claim to such right of access.

Munshi Hanuman Prasad and Shah Asad Ali for the Appellant.

The Senior Government Pleader (Lala Juala Prasad), the Junior Government Pleader (Babu Dwarka Nath Banarji), and Babu Oprokash Chandar for the Respondents.

The Court made the following

Order of Remand:—As we understand the facts, it would appear that land which belonged to and formed part of the old public road and adjoined the plaintiff's premises has been sold by the Municipality to the defendant, but that a sufficient portion of land remains in use as the public road, and the defendant has appropriated to his own exclusive use that portion which he has purchased and which lies between the plaintiff's premises and the present public road, and by so doing the plaintiff avers that defendant has interfered

* Special Appeal, No. 1009 of 1877, from a decree of Ra. Shankar Das, Subordinate Judge of Saharanpur, dated the 5th July 1876, affirming a decree of Muhammad Imdad Ali, Munsif of Saharanpur, dated the 18th May 1876.

with his right of way and prevented approach as of old on his part from his premises to what now constitutes the public road. The plaintiff asks that a passage three yards wide be opened across the purchased land to the public road for his use; he also seeks to have a drain opened which defendant has closed. The Court of First Instance decreed the opening of the drain, and dismissed the rest of the claim, and the lower Appellate Court has affirmed this decision. The Subordinate Judge has found that the land purchased by the defendant was a public thoroughfare, but has held that plaintiff has no right to relief in respect of maintenance of his right of way, apparently on the ground that he could obtain access to the public road by making a detour, and that any inconvenience to him would be trifling compared with the loss to the defendant who has purchased the land at a high price. This judgment proceeds on erroneous grounds. If the land purchased from the Municipality was part of a public thoroughfare, and the defendant by his purchase obstructs its use, the plaintiff can sue for relief, if he can show that he has been individually injured by the defendant's act. In the present case there is no doubt that such injury has been shown, if the plaintiff's allegations are true that he has no longer the direct access to the present public road which he had before, and that the act of the defendant has [559] caused the closing of an established drain, and it would be no ground for denying him relief that he may by making a detour to get access to the road, or that to give him relief will interfere with the benefit which defendant anticipated from his purchase.

The questions for decision are whether the land bought by defendant was part of a public thoroughfare; whether the title obtained by the defendant under the Municipality's right to sell was one which gave him the land free from any liability or responsibility to the plaintiff on account of previous user of it; and whether plaintiff has suffered the injuries alleged by the defendant's act so as to give him a right of action and a claim to the relief now sought.

It will be necessary that the Municipality be properly represented in the suit as defendant, and we remand the case under s. 351 of Act VIII of 1859 that this may be done and the above issues tried and decided; when the lower Appellate Court will return the case with its finding to this Court, and seven days will be allowed for objections to be preferred to the finding.

On the return of the Subordinate Judge's finding, the Court delivered the following

Judgment:—The lower Court's finding on the issues remitted is to the effect that the land in dispute formed part of a public thoroughfare, and that the defendant by his occupation of it since his purchase from the Municipal Committee has interfered with the plaintiff's right of drainago and way. On the latter point the Court's finding shows that plaintiff's premises adjoin this land, and while it formed part of the highway he and his tenants had immediate access to the highway, but by the exclusive occupation of this portion of the highway by defendant their access to that portion which now forms the highway has been shut off, and no other adequate means of access has been provided.

Accepting the finding it shows that plaintiff has suffered injuries and inconveniences by the closing of the highway by defendant, which affect him beyond what affects the public at large, and he has in consequence a right of action against the defendant, Maha Chand, and there is nothing in the circumstance that defendant's title is derived by purchase of the land from the Municipality, as has been urged, which can affect the plaintiff's right to

relief. [560] No doubt by s. 38 of the Municipalities Act the property in all public highways is vested in the Committee, and by s. 27 the Committee can, with the sanction of the Local Government, sell any portion of land referred to in that section which is not required for the purposes of the Act, and shall keep roads in repair and may do all acts and things necessary for purposes of general utility—s. 32. But there is nothing in the Act which debars the Civil Courts from entertaining suits and giving relief in respect of any civil right which may be shown to have been infringed through the exercise by the Municipality of its powers under the Act; on the contrary, provision is made for such suits. Hero the plaintiff has made out a case. He has shown that the drainage from his premises has been stopped, and that he has been isolated and shut off from access to the present highway. The Municipality could not have thus dealt with the highway to the special injury of the plaintiff. In closing a portion of it they would have been bound to provide adequately for his drainage and his access to the highway which they had substituted; indeed, it is not clear that they had any intention of doing otherwise, and the defendant can do no less.

The relief which plaintiff now seeks is very reasonable. He does not ask to set aside the sale of the land, but that a cart-road nine feet wide should be reserved communicating with the highway, and that the existing course of drainage be not interfered with.

We decree the appeal, and modifying the decrees of the lower Courts, decree the claim with all costs.

Appeal allowed.

NOTES.

[The same view was taken by other High Courts:—3 Cal., 20; 2 Bom., 457; 1 All., 249; 9 Mad., 465.]

[1 All. 560]

APPELLATE CIVIL.

The 21st January, 1878.

PRESENT:

MR. JUSTICE PEARSON AND MR. JUSTICE OLDFIELD.

Radhia.....Defendant

versus

Beni and others.....Plaintiffs.*

Act VIII of 1859 (Civil Procedure Code), s. 2—Res judicata.

The plaintiffs in the present suit claimed, as the heirs of *J*, certain property from *M*, the daughter of *R*, alleging that such property was the joint and undivided property of *R* and *J*, to which on *R*'s death *J* had succeeded. The [561] plaintiffs had formerly, after the death of *J*, sued *M* for such property, alleging that it was the separate property of *R*, and that on the death of *R*'s widow they were entitled to succeed thereto. Held that the decision in the former suit that such property was the separate property of *R*, to which *M* was entitled to succeed on the death of his widow, was a bar to their present suit.

* Special Appeal, No. 866 of 1877, from a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 30th April 1877, affirming a decree of Munshi Man Mohan Lal, Munsif of Akbarpur, dated the 1st December 1875.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court to which the defendant appealed against the decree of the lower Appellate Court. That decree affirmed the decree given by the Court of First Instance to the plaintiffs. The defendants contended that the matter in dispute was *res judicata*.

The Senior Government Pleader (*Lala Juala Prasad*), for the Appellant.

Lala Lalta Prasad and *Munshi Kashi Prasad*, for the Respondents.

The Judgment of the Court was delivered by

Oldfield, J.—It appears that one Jai Ram had four sons, Basawan, Mata Din, Jhau, and Ram Bakhsh. They are all deceased, Jhau having died in 1868, and Ram Bakhsh some sixteen years ago, leaving a widow Dallo, who died in 1871, and a daughter, the defendant in this suit. The plaintiffs represent Mata Din. On the death of Dallo they sued in 1874 this defendant, the daughter of Ram Bakhsh, for the property now in suit, alleging that they were the heirs of her deceased father, Ram Bakhsh, and of Dallo; that suit was dismissed. They now sue her for the same property, alleging that Jhau and Ram Bakhsh lived and held the property as joint property, and that Jhau succeeded to Ram Bakhsh, and they are his heirs. The defendant pleaded that the claim was barred with reference to the decision in the former suit, and that it was also barred by limitation, owing to the long adverse possession of Dallo and the defendant. Both Courts have decreed the claim; the lower Appellate Court has held that there is no estoppel under the Evidence Act to bar the suit, and that Ram Bakhsh and Jhau held the property jointly, and this being so, it must be concluded that, at Ram Bakhsh's death, Jhau succeeded to his share, and the possession of Dallo in a part of the premises was not adverse to him.

【362】 It appears to us that this judgment of the lower Appellate Court is inconsistent with the findings on facts made in the suit which the plaintiffs brought in 1874 against the defendant, and that the lower Appellate Court has failed to properly consider the plea which was raised as to the effect of the judgment on this claim, and we consider that the suit cannot be maintained with reference to the former case. The plaintiffs brought the former suit on the ground that they were heirs of Ram Bakhsh and Dallo; that the property formed the estate left by Ram Bakhsh and Dallo; and they further alleged that Ram Bakhsh had lived separate in estate from all his brothers. When they brought that suit Jhau had been dead some years, and their present claim that he succeeded to the estate at Ram Bakhsh's death as his heir, and that he held it jointly with Ram Bakhsh, was never urged in the former suit, and is wholly inconsistent with their allegations in that suit. But it further appears to us that the question of the nature of the estate, whether held separately by Ram Bakhsh from all his brothers, and the nature of Dallo's and the defendant's title and possession were questions which properly fell to be decided in that suit, and were in our opinion decided in favour of the defendant, and that the effect of that decision is to bar the claim both under s. 2 of Act VIII of 1859 and the Limitation Act. It was distinctly pleaded by defendant in that suit that after Ram Bakhsh's death Dallo had possession of the house in suit, and that defendant was entitled to the house by inheritance and the finding was as follows: "It is therefore satisfactorily established that for a long period Ram Bakhsh, and after his decease his widow, Dallo Kuwar, had separate and adverse possession of the property in dispute, and under such circumstances the daughter, i.e., the appellant has, according to Hindu Law, the right of inheritance to the estate in suit left by Ram Bakhsh

and his widow as against respondents. We cannot reconcile the above with the present finding that Dallo's possession was not adverse to Jhau. Anyhow, the judgment in that case appears to us to be final in respect of defendant's title as against the plaintiffs whether they claimed in that suit as heirs of Ram Bakhsh or of Jhau, for at that time any title they had as heirs of Jhau had already accrued, and as we have remarked the entire character of Dallo's and defendant's title and possession as against [563] them was opened out by the pleadings, and properly fell to be decided in that case, and cannot be raised again.

We decree the appeal with all costs and reverse the decrees of the lower Courts and dismiss the suit.

Appeal allowed.

[1 All. 563]

APPELLATE CIVIL.

The 21st January, 1878.

PRESENT :

MR. JUSTICE PEARSON AND MR. JUSTICE OLDFIELD.

Chadami Lal.....Plaintiff

versus

Muhammad Bakhsh and another.....Defendants.*

Pre-emption—Contract—Wajib-ul-arz—Custom—Appeal.

The plaintiff in a suit to enforce a right of pre-emption in respect of certain shares in certain villages, founded his claim on a special agreement contained in the village administration-papers, and such claim was tried and determined in the lower Court as so founded. Held that the plaintiff could not in appeal set up a claim to enforce such right founded on custom.†

THIS was a suit for pre-emption founded on special agreement. The facts of the case and the manner in which the Court of First Instance dealt with the suit are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the plaintiff appealed from the decree of the Court of First Instance dismissing his suit.

The Junior Government Pleader (Babu Dwarka Nath Banarji) and Munshi Hanuman Prasad, for the Appellant.

Pandits Bishambhar Nath, Ajudhia Nath, and Nand Lal, for the Respondents.

* Regular Appeal, No. 86 of 1877, from a decree of Pandit Har Sahai, Subordinate Judge of Farukhabad, dated the 28th April 1877.

† See also *Koonj Behari Lal v. Girdhari Lal*, 1 B. L. R., S. N., 12, S.C., 10 W. B., 159, and *Shiv Suhai v. Hari Suhai*, 3 B. L. R., Ap., 142, in which cases it was held that, where a plaintiff seeks to enforce a right of pre-emption upon the ground of partnership, he cannot obtain a decree upon the ground of vicinage.

The Judgment of the Court was delivered by

Oldfield, J.—This suit has been brought to recover certain shares in mauza Saran Top and Mahal Bagh, pargana Kanauj, by right of pre-emption based on the village administration-papers of the current settlement. It was urged in defence by the purchaser [564] that the village administration-papers are not binding on his vendor, who was no party to them, and that, as a matter of fact, the plaintiff refused the offer of the estates when made to him. The lower Court has dismissed the claim finding in favour of the answering defendant. The objections now taken in appeal by the plaintiff appear to us to fail. The *wajib-ul-arz* of Mahal Bagh was not signed by the vendor or any one he represents, and though in that of the zamindari mahal there is an endorsement to the effect that Gajadhar Lal attested it, there is nothing to show that, if he did so, he had any authority to do so. He was the lessee of the owner, Musammat Banno, but this position did not give him authority to act for her at the settlement. In his evidence he states that he cannot remember about the attestation of the *wajib-ul-arz*, and he never had any power of attorney to act as her agent.

We concur with the lower Court in considering that it is not satisfactorily proved that the vendor or any one he represents was a party to the execution of the village administration-papers, or knowingly accepted their conditions. Whether or not any similar condition of pre-emption was entered in the previous administration-paper cannot affect this claim, which is brought on the contract under the recent settlement-paper, and not on any well-established custom apart from the contract made under the administration-paper, nor would the entry of the right of pre-emption in a former administration-paper necessarily establish, though it might be evidence towards proving, such a custom.

[1 All. 564]

FULL BENCH.

The 22nd January, 1878.

PRESENT :

SIR ROBERT STUART, Kt., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, MR. JUSTICE SPANKIE, AND MR. JUSTICE OLDFIELD.

Dwarka Das and another.....Defendants
versus
Husain Bakhsh.....Plaintiff.*

Pre-emption—Hindu vendor—Muhammadan law—Act VI of 1871 (Bengal Civil Courts' Act), s. 24.

Held (STUART, C. J., and PEARSON, J., dissenting) that where the vendor is a Hindu a suit to enforce a right of pre-emption founded upon Muhammadan law is not maintainable. *Chundo v. Alim-ud-din* (H. C. R., N.W. P., 1874, p. 28) overruled. *Poorno Singh v. Hurrychurn Surmah* (10 B. L. R., 117) followed.

[565] Per STUART, C.J., and PEARSON, J., contra.

* Special Appeal, No. 1858 of 1876, from a decree of H. W. Dashwood, Esq., Judge of Meerut, dated the 12th September 1876, reversing a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 21st April 1876.

THIS was a suit to enforce a right of pre-emption in respect of a dwelling-house, the suit being founded on Muhammadan law, the plaintiff claiming such right as a neighbour of the vendors, defendants in the suit, who were Hindus, the plaintiff and the purchaser, also a defendant in the suit, being Muhammadans. The defence to the suit raised the question whether a suit to enforce a right of pre-emption founded upon Muhammadan law was maintainable where the vendor was a Hindu. The Court of First Instance did not determine this question, but dismissed the suit on grounds which it is immaterial for the purposes of this report to state. On appeal by the plaintiff, the lower Court of appeal, reversing the judgment of the Court of First Instance, held, with reference to the case of *Chundo v. Alim-ud-din* (H. C. R., N.-W. P., 1874, p. 28) that a suit to enforce the right of pre-emption founded on Muhammadan law was maintainable where the vendor was a Hindu, and gave the plaintiff a decree.

The defendants appealed to the High Court, again contending that, under s. 24 of Act VI of 1871, the vendors being Hindus, the Muhammadan law of pre-emption was not applicable.

The Court (SPANKIE and OLDFIELD, JJ.) referred to the Full Bench the question whether the Muhammadan law of pre-emption applied, with the following remarks : —

The question was decided in the affirmative by a majority of three out of four Judges comprising a Full Bench of this Court in *Chundo v. Alim-ud-din* (H. C. R., N.-W. P., 1874, p. 28). One of the Judges composing the Court however dissented, and the Chief Justice subscribed to the view taken, with hesitation. We have considerable doubts as to the correctness of the ruling, which is opposed to one by the High Court of Calcutta in *Poorno Singh v. Hurry Churn Surnah* (10 B. L. R., 117), and thinking it desirable that the question be reconsidered, we refer it to the Full Bench of the Court.

Munshi Hanuman Prasad and Pandit Ajudhia Nath, for the Appellants.

Mr. Conlan and Babu Oprokash Chandar, for the Respondent.

The following Judgments were delivered by the Full Bench :—

[566] Stuart, C.J.—I am reminded by the order of reference that in the case of *Chundo v. Alim-ud-din* (H. C. R., N.-W. P., 1874, p. 28) I gave my judgment with hesitation. I did so, no doubt, but chiefly, if not solely, in consequence of the deference I felt for the opinion of my colleague, Mr. Justice SPANKIE, in the case of *Shumshoolnissa v. Zohra Beebee* (H. C. R., N.-W. P., 1874, p. 2), who had most carefully and anxiously considered the question now referred in the long judgment he therein delivered. I cannot, however, say for myself that I had any doubt, that is, any argumentative doubt, on the question then before us, and I remain of the opinion I then expressed and subsequently in the Full Bench in the above case of *Chundo v. Alim-ud-din* (H. C. R., N.-W. P., 1874, p. 28), and this is my answer to the reference.

Pearson, J.—For the reasons given in my judgment of the 1st December 1873, in Full Bench, in the case of *Chundo v. Alim-ud-din* (H. C. R., N.-W. P., 1874, p. 28), I adhere to the opinion therein expressed.

Turner, J.—I have never been able to accept the grounds on which it was contended that on the sale of the property by a Hindu a right of pre-emption arises. Our Courts are not strictly bound to enforce the law of pre-emption unless founded on custom or contract, though they have gone so far as to give effect to that law where the vendor is a Muhammadan. The circumstance

that on a sale a right of pre-emption accrues greatly affects the value of the property, and it has always appeared to me most inequitable to allow such a claim to be asserted on the sale of the property by a Hindu, if it be not based on local custom or special agreement.

Spankie, J.—The point has been so exhaustively argued in the decision of this suit and in the Full Bench case cited in the order of reference that it is quite unnecessary to go over the ground again. I would say that, as the purchaser bought the property from a Hindu, there is no right of re-purchase from him under the Muhammadan law of pre-emption on the ground that the vendee and pro-emptor are both Muhammadans.

Oldfield, J.—The Muhammadan law recognises the right of pre-emption on the ground of avoiding the inconvenience to a neighbour which might arise by the sale of adjoining property to a stranger. The right can be claimed by all description of persons without reference to difference of religion. We find in the Hedaya [367] that “the privilege of Shaffa is established after sale, and the right of the Shaffee is not established until after demand be regularly made, &c.” These and similar passages imply only that a complete title to claim the right of pre-emption accrues only on completion of sale, when the former owner's interest in the property has ceased, but the right itself would seem to spring out of a rule of Muhammadan law enacted in the interest of neighbours, and which would seem to be binding only on all those owners being vendors of property who are subject to Muhammadan law, and who necessarily hold their property subject to this rule of law, which will affect them and the property wherever a sale takes place to bring the rule of law into operation.

I concur in the view taken in *Poorno Singh v. Hurry Churn Surmah* (10 B. L. R., 117). I would reply that the Muhammadan law of pre-emption does not apply to the case referred to.

NOTES.

On the subject of pre-emption, see also 5 All., 110; 7 All., 775 F.B. which is the leading case; 32 Cal., 982.

[1 ALL. 567]

APPELLATE CIVIL.

The 23rd January, 1878.

PRESENT:

SIR ROBERT STUART, K.T., CHIEF JUSTICE, AND MR. JUSTICE TURNER.

Maratib Ali.....Plaintiff

versus

Abdul Hakim and others.....Defendants.*

*Pre-emption—Contract—Muhammadan law—Custom—Wajib-ul-arz—
Special appeal.*

Where the existence in a certain village of the right of pre-emption was recorded in the village administration-paper as a matter of agreement and not of custom, and a suit was

* Special Appeal, No. 571 of 1877, from a decree of Rai Shankar Das, Subordinate Judge of Saharanpur, dated the 20th February 1877, affirming a decree of Muhammad Imdad Ali, Munsif of Saharanpur, dated the 21st December 1876.

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brought to enforce such right founded on the agreement, and was tried and determined in the lower Courts as so founded, the plaintiff could not in special appeal claim such right as a matter of custom in virtue of the entry (see also *Chadami Lal v. Muhammad Baksh*, I. L. R., 1 All., 568, and note to that case).

A claim to the right of pre-emption founded on a special agreement does not exclude a claim to such right founded on Muhammadan law (see also *Nehchul v. Than Singh*, H. C. R., N.-W. P., 1870, p. 222).

THIS was a suit to enforce a right of pre-emption in respect of a share in a certain village, the suit being founded on an agreement contained in the village administration-paper and on the Muhammadan law of pre-emption. The Court of First Instance dismissed the suit on the ground that the administration-paper was not signed by the vendor and the agreement was consequently not binding on him, and on the further ground that the plaintiff had not [568] fulfilled the conditions of the Muhammadan law of pre-emption. On appeal by the plaintiff, the lower Appellate Court also held that the claim on the agreement was unmaintainable, as the vendor had not signed the administration-paper, and held also that the claim on the agreement excluded the claim based on Muhammadan law.

The plaintiff appealed to the High Court, contending that the claim on the administration-paper did not exclude that based on the Muhammadan law; and that the mere fact that the vendor had not signed the administration-paper did not affect the claim thereon, the administration-paper being only a record that the custom of pre-emption prevailed.

Munshi *Hanuman Prasad*, for the Appellant.

Babu *Oprokash Chundar*, for the Respondents.

The Court made the following

Order of Remand:—The second plea is overruled because it was admitted that the existence of the right of pre-emption was entered in the record as a matter of agreement and not of custom, and on these averments the suit has been tried and the issues fully investigated; but the validity of the first plea must be admitted. The claim based on the *wajib-ul-arz* did not exclude a claim under Muhammadan law. The lower Appellate Court must determine whether the appellant had, under the Muhammadan law, the right of pre-emption, and secondly, if he had the right, whether he duly performed the conditions which, under the Muhammadan law, are essential to the validity of the right, namely, the immediate expression of his intention to purchase an immediate demand.

Cause remanded.

[1 All. 568]

FULL BENCH.

The 24th January, 1878.

PRESENT :

SIR ROBERT STUART, Kt., CHIEF JUSTICE, MR. JUSTICE PEARSON,
 MR. JUSTICE TURNER, MR. JUSTICE SPANKIE, AND
 MR. JUSTICE OLDFIELD.

Makundi Lal.....Plaintiff

versus

Kaunsla.....Defendant.*

Sale in execution of decree—Right of auction-purchaser to recover purchase-money on the sale being set aside—Fraud on the part of decree-holder—

Fraud on the part of auction-purchaser—Minor—Costs.

A decree-holder fraudulently caused the sale in execution of his decree of certain immoveable property belonging to a minor. The minor brought a suit [569] for a declaration that such sale was invalid and obtained possession of the property from the auction-purchaser. The auction-purchaser sued the decree-holder to recover his purchase-money and the costs incurred by him in defending the suit brought by the minor. *Held, per* PEARSON, TURNER, SPANKIE, and OLDFIELD, JJ., it being found that the auction-purchaser was not a party to or cognizant of the fraud on the part of the decree-holder, that neither the mere fact that the auction-purchaser knew that he was purchasing the property of a minor, nor the mere fact that he did not ascertain whether or not the sale was justified by the terms of the decree, disentitled him to recover the purchase-money from the decree-holder.

Held also that, being innocent of fraud and having purchased in the *bona fide* belief that the property of the minor was saleable, he was entitled to recover the purchase-money. *Kelly v. Gobind Das* (H. C. R., N.-W. P., 1874, p. 168) distinguished.

Held also that he could not recover the costs incurred by him in defending the suit brought by the minor, being a suit he ought not to have defended.

Per STUART, C.J.—That the auction-purchaser, being guilty of fraud, was not entitled to recover the purchase-money, and, assuming that he was innocent of fraud, that, having purchased with the knowledge that the property was the property of a minor and without ascertaining that the sale was justified by the terms of the decree, he could not recover the purchase-money.

THIS was an appeal to the Full Court under s. 10 of the Letters Patent.

Tikaitin, defendant in the present suit, gave one Hira Singh a bond for the payment of money in which, as guardian of her minor son, she mortgaged certain immoveable property belonging to the minor. Hira Singh sued Tikaitin in her own right and as guardian of her son upon this bond, and obtained only a money-decree against Tikaitin personally, in execution of which he was allowed by the Court which made the decree to bring to sale the property of the minor. The property was purchased by Makundi Lal, the plaintiff in the present suit. The minor having subsequently, in a suit against Makundi Lal, obtained a declaration that the sale was invalid, and recovered possession of the property from him. Makundi Lal brought the present suit

* Appeal No. 4 of 1876 under cl. 10, Letters Patent.

to recover from Hira Singh and Tikaitin his purchase-money, the costs incurred by him in defending the suit brought by the minor, and interest. Hira Singh pleaded that the plaintiff had no cause of action. The Court of First Instance dismissed the suit, holding with reference to the case of *Kelly v. Gobind Das* (H. C. R., N.-W.P., 1874, p. 168) that the suit was barred by the rule *caveat emptor*. The lower Appellate Court, relying on *Neelkunth Sahee v. Asmun Matho* (H. C. R., N.-W. P., 1871, p. 67) set aside the lower Court's decree and remanded the suit under s. 351 of Act VIII of 1859. Hira Singh having died while the suit was pending in the lower Courts, Kaunsila, the mother and guardian of his minor son, his representative, appealed to the High Court contending that the case was governed by the decision in *Kelly v. Gobind Das* (H. C. R., N.-W. P., 1874, p. 168) and the rule *caveat emptor* applied. The Court (STUART, C.J., and OLDFIELD, J.), having examined the plaintiff as to the circumstances of the sale, differed as to the plaintiff's right to recover the purchase-money.

Stuart, C.J.—I am of opinion that the judgment of the Judge is wrong and must be reversed, and that the decree of the Munsif should be restored. The facts are these: On the 20th September 1867, plaintiff purchased at auction two pies four gandas share in muzra Ballipur Tatta, pargana Chail, in execution of a decree of Hira Singh, father of Beni Prasad, the present defendant, against Tikaitin. This decree had been obtained in a suit on a bond which had been executed by Tikaitin, and in which she hypothecated the property of Ganga Din, who was at the time a minor. She herself had no means or property of her own, and in fact lived on offerings received by her in charity, and the money borrowed, Rs. 100, was to meet her own personal wants, and not on account of any necessity relating to the interest or benefit of her minor son. Ganga Din had been made a defendant in the suit by Hira Singh, but the fact of his minority had been brought before or had come to the knowledge of the Court, for the decree given was against Tikaitin herself exclusively. The attempt, therefore, to execute the decree against the property of the minor could not but fail; and in a suit instituted by the minor, after he became of age, against the auction-purchaser, he obtained a decree, dated the 29th November 1873, for possession of his property, and which of course had the effect of invalidating and setting aside the auction-sale itself.

Under these circumstances, the auction-purchaser now brings the present suit to recover back from the defendant, Beni Prasad, the son and heir of Hira Singh, the original decree-holder, and Tikaitin, the amount of the sale-price and the costs which he had to pay in the litigation with Ganga Din, together with interest on [371] both. Tikaitin makes no defence, and the other defendant, Beni Prasad, simply denies that there is any cause of action against him, and that he is not liable to the claim. The Munsif was of opinion that the doctrine of *caveat emptor* applied, and in support of this view of the law referred to the ruling of this Court in the case of *Kelly v. Gobind Das* (H. C. R., N.-W. P., 1874, p. 168); he therefore dismissed the claim with costs and interest. On appeal to the Judge, the decision of the Munsif was reversed, he relying on another earlier ruling of this Court in the case of *Neelkunth Sahee v. Asmun Matho* (H. C. R., N.-W. P., 1871, p. 67).

In special appeal it is now contended that the plaintiff had purchased with notice of Gunga Din's minority, and that on the authority of the above ruling in *Kelly v. Gobind Das* (H. C. R., N.-W. P., 1874, p. 168) the doctrine of *caveat emptor* clearly applies. The bad faith of the decree-holder in attempting to sell the minor's rights under a decree which applied only to his mother, I do not for one moment defend. In such a case as this, however,

the decree-holder's conduct, however bad, is immaterial, unless the auction-purchaser is considered to have shown the opposite qualities, and to have acted honestly and in good faith, i.e., that he became the purchaser of the minor's property in the honest belief that it could legally be sold in execution of the decree. The only ground for holding that he entertained such an honest belief was what is stated to have been an official announcement or proceeding read at the time of the sale that the minor's rights would be included. It is stated to have been reported to the Civil Court that the name of Ganga Din's mother was not upon the revenue record, but only his (the minor's), and that, thereupon the Court made an order to put up the rights of both mother and son to sale. How the Court could have done this, in the face of its own decree, it is difficult, if not impossible, to understand, but of itself it appears to afford no sufficient excuse for the plaintiff's deliberately going on with his purchase; and it cuts both ways, for if it is good for the auction-purchaser it was equally good for the decree-holder, and the latter had as much right and reason to rely upon it as the former; and assuming that they both thus acted in good faith, i.e., in honest reliance on the Court's announcement or order, what is the necessary consequence? Namely, that [572] the decree-holder has at once a good answer and can safely say *caveat emptor* to the plaintiff. After the first hearing of the case we ordered that Makundi Lal, the auction-purchaser, should attend and give his evidence before us as to his knowledge of the facts relating to the sale. He appeared and stated that he was a mahajan and had been such for upwards of twenty years; that he was in the habit of going to the Collector's Court, and it happened that he was there on the day of this sale, and bid. He did not at first know that it was the property of the minor that was to be sold, but a proceeding was read out to the effect that the rights and interest of Tikaitin and Gunga Din, the minor, were to be sold in execution of a decree held by Hira Singh. He then knew that it was the property of the minor that was to be sold, and he understood that the money was to be applied on account of expenses incurred in the maintenance of the minor. He does not say anything about the decree, or that he had seen it, or that he knew its terms, but he makes the singular statement that he believed the decree-holder, was present at the sale, that is, in the same place with himself *but he had no conversation with him, he was not acquainted with him.* Notwithstanding, he adds that, from what he had been told about the sale-proceeding and the proceeding from the Collector, he was satisfied that the property of the minor could be sold, and he offered Rs. 230. He added that it is not his habit to make enquiries except as regards the value of the property to be sold, and "I take into consideration whether the auction involves any dispute or does not, when the judgment-debtor is a minor. In such a case I do not bid at all. In the present case I thought from what took place that there would be no dispute, and I bid." This is surely a very extraordinary and far from satisfactory explanation by a mahajan of twenty years' experience. There appears to me to be bad faith on the face of his deposition, and that the real meaning and significance of the portion of it I have just quoted was that he determined to take the risk of the minor's subsequently disputing the sale. My belief is that both parties, the decree-holder and auction-purchaser, were in bad faith, and that in trying to overreach each other they have simply contributed to the well-known contention which results in honest men coming by their own. The plaintiff, auction-purchaser, tells us distinctly that he made the purchase [573] with the full knowledge that the property belonged to the minor, and that the fact that it was the minor's property was publicly and distinctly announced at the sale. Yet, although the decree-holder was present, he makes the ridiculous excuse that he had no conversation with him, and that he was

not acquainted with him, nor did he take any pains to ascertain the terms of the decree. And this from an acute and cautious mahajan of twenty years' experience! The very words of the decree are these,—“Having duly considered the arguments of both the parties, it is ordered that a decree be given in the plaintiff's favour for the amount claimed, with costs and interest, against the female defendant. She is to pay the amount of the decree in a year. Pleaders to get their fees.” All this the auction-purchaser was bound to know, and if he was content with the sort of general inquiries he appears to have made, he must take the consequences. He had every opportunity and the means for ascertaining the real state of the case, and I cannot listen to him for one moment when he states that, although the decree-holder was present with him at the sale, nothing passed between them. Under all the circumstances, and having regard to his own evidence, the auction-purchaser must be taken to have had not only full notice of the minority of the person whose property he was seeking to purchase, but as having lent himself to a proceeding not only illegal and invalid in itself but grossly in fraud of the minor's rights. It was argued before us that the doctrine of *caveat emptor* does not apply to a public sale; but for this opinion there does not appear to be any authority, although in a case like the present it is unnecessary to consider the question. Such a view of the law probably arises out of a misapprehension of the rules of the common law of England as to sales in market *overt* but which can have no possible application to the sale in execution of a decree in India of the rights and interests of a minor. And in such a case as this where, under cover of a sale of such rights and interests, the minor's property was attached and taken, it would be subversive of all justice if an auction-purchaser was not made to feel the risk he ran, and that, to say the least, he was fully, if not within the principle at least, liable to the penal consequences of the rule of law in question. The peril he undertook was in truth greater than that of a venturesome buyer shutting his eyes to [574] his possible danger, for he clearly knew of Ganga Din's minority and all the circumstances when he appeared at the sale, and he therefore not only acted in bad faith, but involved himself in a risk as purchaser which was different from that against, only because it was much greater than that against, which the doctrine of *caveat emptor* is directed. I should add that I cannot accept the ruling of this Court in the case of *Neelkunih Sahee v. Asmun Matho* (H. C. R., N.-W.P., 1871, p. 67); but I fully adhere to my own ruling in the case of *Kelly v. Gobind Das* (H. C. R., N.-W. P., 1874, p. 168), in which the judgment was very carefully considered by Mr. Justice SPANKIE and myself. There was another case referred to by the respondent, that of *Doolhin Har Nath v. Baijoo Oojha* (H. C. R., N.-W. P., 1867, p. 50), where the auction-purchaser succeeded in recovering his money. The case, however, is not well reported. There was a speciality in respect to the property sold being *jagir*, and, therefore, not subject to sale; and it was stated, although it does not appear from the report to have been proved, that the auction-purchaser was aware of the property being *jagir*. If he was aware of the objection, he acted in bad faith, and I must dissent from the ruling. On the other hand if he was not aware of the nature of the property and of its exemption from sale in execution, then he was simply deceived and misled by the decree-holder, and the judgment of this Court was clearly right. But in neither view of the case would the rule of *caveat emptor* have applied. That doctrine relates to defects, latent defects, which the seller at the inception of the contract, does not or is not bound to know or to inquire into, the purchaser taking the risk of the *status quo*. The doctrine, in truth, if it does not contemplate absolute good faith on both sides, at least puts the burden of inquiry and investigation on the seller, but it

has not the same application where there is anything in the nature of bad faith or fraud. The precise terms of the decree cannot be got over, and no announcement by the Court which issued it or by any officer could avail to the contrary; and if the plaintiff might contend that, at any rate, he was misled, it was a misleading which could give him no cause of action against the present defendant, for it was a misleading which he could only share with him, seeing that the defendant was as much entitled to rely on the Court's order (to put up the minor's rights to sale) as [575] the plaintiff. Yet such an order was the plaintiff's only ground for the claim he makes in this suit against the defendant. On the other hand, any difficulty he experienced, and he must, under the circumstances, have felt some, should have put him on his inquiry as to the ownership of, and title to, the property. But he chose to go on, and what he might have easily ascertained, if he did not already know, has come to pass to his loss. In short, the sum and substance of the case is this: the decree-holder attempted to sell the property, and the auction-purchaser took the risk on the chance of the sale not being successfully disputed by the minor and lost his money on the venture. I would decree the appeal, reverse the judgment of the Judge, restore the decree of the Munsif, and dismiss the suit with costs in all the Courts.

Oldfield, J.—Hira Singh father of Beni Prasad, defendant, sued on the 17th January 1866, Tikaitin, the mother and guardian of Ganga Din, for the recovery of a sum of money lent on a bond executed in his favour by Tikaitin and her son Ganga Din, and obtained a decree against Tikaitin, dated the 27th January 1866; the decree was a mere money-decree and a personal decree against her and not in her representative capacity. In execution of this decree, however, the decree-holder caused the rights and interests of both the lady and of Ganga Din, then a minor, to be sold. It appears that it was reported to the Civil Court that the lady's name was not borne upon the revenue records, but only the minor's name was on the records, and the Court made an order to put up the rights and interests of both persons to sale, and the said rights and interests representing a two-pie four-ganda share in Ballipur, were sold and purchased by the plaintiff on the 20th September 1867. Subsequently Ganga Din, on attaining his majority, brought a suit against the decree-holder and the plaintiff, the auction-purchaser, and Tikaitin to invalidate and cancel the bond and the decree of the 27th January 1866, obtained on it, and to establish his right in the property sold. The decree-holder did not defend the suit, and Tikaitin pleaded that the loan under the bond was a personal loan to herself, and the Court made a decree, on the 29th November 1873, in favour of Ganga Din, and held that the money had not been lent for the use or to meet the necessities of the minor so as to render him or his property liable under Hindu law.

[576] The plaintiff, the auction-purchaser, now sues to recover from the defendant, the son and heir of the original decree-holder, and from Tikaitin, the amount of sale price and costs with interest incurred in the suit brought by Ganga Din against him. The Judge has reversed the decision of the Munsif, who held that plaintiff had no cause of action against defendant, and has remanded the case for trial on the merits. The defendant (heir of the decree-holder) now appeals against this judgment. The facts disclosed appear to me to show an amount of bad faith on the part of the decree-holder such as should entitle the plaintiff to recover from him. The decree he obtained was a mere money-decree against Tikaitin personally, notwithstanding which fact he obtained through the Court in execution of his decree the sale of the rights and interests of the minor whom the decree did not affect. The decree-holder was

best acquainted with the nature of the decree he had obtained and cannot be exonerated from the imputation of having deliberately permitted rights and interests of a person not touched by the decree to be sold and bought by the plaintiff. Indeed, he by his pleader appears to have pressed on the Court to order the sale of the minor's interests on the ground that the money had been lent for the maintenance of the minor, a fact disallowed in the suit brought by the minor, where it was held that the money was not lent for the minor's benefit. The decree-holder's bad faith is not confined to the sale-proceedings but attaches to his conduct throughout. The bond which hypothecated the minor's property, and on which the decree-holder obtained his decree, has been held to have represented a loan to Tikaitin for her own use and not for the benefit of the minor, and notwithstanding that Ganga Din was a minor when the bond was executed, yet the decree-holder did not scruple to take a bond in which the said minor is represented as one of the contracting parties contracting in his own person. I can, on the other hand, discover no grounds for attributing bad faith to the auction-purchaser. No doubt he knew he was purchasing a minor's rights and interests, but this knowledge does not necessarily imply connivance in any fraud on the minor, nor have the lower Courts found fraud on his part, nor is it implied that he knowingly bought what he knew was a risky purchase. He seems to have honestly believed that the minor's rights and interests were [577] properly saleable under the decree, and when, in course of execution-proceedings taken by the decree-holder under the decree, the Court ordered the sale of the minor's interests, he was justified in believing that those interests were properly saleable under the decree. He might, perhaps, have been somewhat more careful in looking into the decree, but at most was guilty of some carelessness, and not of the bad faith or sharp practice to which the conduct of the decree-holder appears to me to amount, and I therefore consider his position to be a better one than that of the decree-holder. The cases referred to by the Judge appear to me much in point, while the facts in the case of *Kelly v. Gobind Das* (H. C. R., N.-W. P., 1874, p. 168) appear somewhat different. In that case Kelly, the auction-purchaser, bought at auction-sale property which he had already privately purchased and then conveyed to his wife, and he must have known the insecure nature of his auction-purchase, which was afterwards set aside at his wife's suit, and he may well have been held to have bought accepting the risk, and so not entitled to recover back his purchase-money from the decree-holder. I would affirm the decree of the lower Appellate Court and demand the suit to the Court of First Instance, that the amount due to the plaintiff might be ascertained, and a decree to that amount should be given against the heir of the decree-holder as his representative, and I would dismiss this appeal with costs.

The plaintiff appealed to the Full Court against the judgment of STUART, C.J., under cl. 10 of the Letters Patent, on the ground that (i) there was no evidence to show that he was guilty of laches or fraud, and as the rights of the minor were sold at the instance and on the application of the decree-holder, the decree-holder was liable to make good the loss sustained by the plaintiff; and (ii) that the case of *Kelly v. Gobind Das* (H. C. R., N.-W. P., 1874, p. 168) was distinguishable from the present case, inasmuch as in the present case the conduct of the decree-holder from the beginning was such as to make him liable to the plaintiff's claim.

The Junior Government Pleader (Babu Dwarka Nath Banarji) and Munshi Hanuman Prasad, for the Appellant.

[578] Babus Oprakush Chandur and Jogindro Nath Chaudhri, for the Respondent.

The following **Judgments** were delivered by the Court :—

Stuart, C.J.—I adhere to my first judgment, having heard nothing from the bar when the case came before the Full Bench, or from the other members of the Court, to induce me to change my opinion in any respect.

Pearson, (TURNER, SPANKIE and OLDFIELD, JJ., *concurring*).—(After stating the facts as set out, the judgment continued) :—The purchaser has appealed to the Full Court, and it is contended on his behalf that there is no evidence of any fraud on his part nor of any such laches as disentitle him to recover, and that as a *bona fide* purchaser he is entitled to the return of his purchase-money now that the sale of the minor's share has in effect been set aside. Firstly, then, as to the question of fraud, it is to be noticed that no allegation was made in the written statement filed by the decree-holder imputing fraud to the purchaser. It was indeed stated that he was acquainted with the circumstances set out in the proceeding ordering the sale; that he knew he was purchasing the property of a minor brought to sale for the satisfaction of a debt stated to have been contracted on the minor's behalf; but it was not alleged that he was aware the debt had not been so contracted, nor that he was aware the order for sale was not warranted by the terms of the decree. The Munsif having dismissed the suit without trial, the only evidence as to the present appellant's knowledge of the circumstances of the sale is that which is to be derived from the examination of the present appellant in the High Court. That evidence is insufficient to justify the inference that he was in any way a party to or had cognizance of the fraud of the decree-holder.

It is, however, argued that the purchaser ought not to recover his purchase-money because he was aware he was purchasing the property of a minor, and therefore incurring risk, and that in the next place he did not take the pains to see that the order was warranted by the decree. To hold that the purchaser, if the sale of a minor's property is set aside, is not entitled to recover back the consideration from a third party who has brought about the sale and obtained the consideration, would very greatly depreciate the [579] selling value of the property of minors, and no authority has been cited to support the contention. It is not apparent why in purchasing the property of minors the purchaser should be deprived of an equity which cannot injure the minor, and to which a purchaser would be entitled if the property purchased had belonged to a person of full age.

If the doctrine of *caveat emptor* applies where the sale has been practically set aside, then it may be proper to hold that the omission to see that the order of sale was warranted by the decree amounted to such a want of reasonable care as to deprive the purchaser of his right to relief. But should not the question of what amounts to reasonable care be considered in reference to the circumstances of the place? In England purchases of real estates are rarely made without the intervention of a solicitor and a scrutiny of title. In these provinces such precautions are almost entirely unknown. However this may be, it would be going too far to hold that the mere omission to see that the order for sale was warranted by the decree ought to deprive the purchaser of relief under the circumstances at present known to the Court, if on other grounds he is entitled to it. Assuming then that the purchaser was innocent of fraud and purchased in the *bona fide* belief that the minor's property was properly saleable, there seems no reason why he should not recover back his purchase-money from the decree-holder through whose misfeasance the order for sale was obtained. This case is clearly distinguishable from *Kelly's* case (H. C. R., N.-W. P., 1874, p. 168) which have been cited at the hearing. Here the sale has been virtually set aside so far as regards the rights and

interests of the minor, the owner of the share. In *Kelly's* case the sale was not set aside. Kelly, knowing that his wife had already purchased the judgment-debtor's interests in the property offered for sale, purchased what was offered for sale, that is to say, whatever right, title, or interest remained to the judgment-debtor in the property. On similar grounds it has been held in other cases that a purchaser at auction in execution of decree is not entitled to recover back his purchase-money or compensation, although it may be subsequently discovered that the judgment-debtor has a less interest in the property offered for sale than was [580] suggested by the advertisement or even no interest at all. But in these cases also the sale has not been set aside.*

But while the present appellant is entitled to recover from the decree-holder his purchase-money and reasonable interest, it cannot be held that he can recover the costs of a suit which he should not have defended. On receiving information of the minor's claim he might have investigated it, and by surrendering the property have escaped the costs of suit. Had he wished to protect himself from those costs he might have informed the decree-holder that he declined to defend the suit unless he obtained a guarantee for the costs. In the absence of such a guarantee he cannot recover anything on this account as against the decree-holder. The decree of the Division Bench, so far as it dismisses the claim to the purchase-money and interest, is reversed, and the order of the Judge affirmed with proportionate costs.

Tikaitin did not appear in the Court of First Instance nor in the Judge's Court, nor did she appeal the Judge's order to the Court, but in carrying out the order the Munsif should see that some cause of action is established against this defendant; at present no cause of action is disclosed.

Appeal allowed.

[1 All. 580]
FULL BENCH.

The 29th January, 1878.

PRESENT :

SIR ROBERT STUART, K.T., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER, AND MR. JUSTICE SPANKIE.

Fakir Muhammad.....Decree-holder
versus

Ghulam Husain and another.....Judgment-debtors.†

*Execution of decree—Limitation—Act IX of 1871 (Limitation Act), sch. ii,
art. 167—Application to enforce or keep in force a decree.*

Held by the Full Bench that the date on which an application for the execution of a decree is presented, and not any date on which such application may be pending, is "the date of applying" within the meaning of art. 167, sch. ii of Act IX of 1871.

* See *Muhammad Basirulla v. Shaikh Abdulla*, 4 B. L. R., App. 85; *Sowdamini Chaudrain v. Krishna Kishor Poddar*, 4 B. L. R., F. B. 11, S.C. 12 W.R., F. B. 8; *Rajiblochun v. Bimalamoni Dasi*, 2 B. L. R., A. C. 85; and 6 Bom. H. C. Rep. A. C. J. 258.

† Miscellaneous Regular Appeal, No. 12 of 1876, from an order of Maulvi Muhammad Abdul Majid Khan, Subordinate Judge of Shahjahanpur, dated the 14th December 1875.

[581] Held by the Division Bench that an application by the decree-holder for the stay of execution-proceedings is not an application to enforce or keep in force the decree, within the meaning of the same law.

THE decree-holder in this case applied for execution of the decree on the 9th April 1872. On the 28th August 1872, he represented to the Court executing the decree that partial execution thereof had been obtained, and that the parties would probably come to some arrangement respecting the other relief granted by the decree, and to enable this arrangement to be made, he prayed that the proceedings in execution might be stayed for 15 days. The Court, however, on the same day, without according time, struck off its file the application for execution. The next application for the execution of the decree, being the present one, was filed on the 28th July 1875. The Court held that this application was barred by limitation.

On appeal by the decree-holder to the High Court it was contended by him that the application for execution dated the 9th April 1872, kept the decree in force up to the date it was disposed of, viz., the 28th August 1872, and that the application of the 28th July 1875, being within three years of that date, was within time.

The Court (STUART, C.J., and TURNER, J.), with reference to this contention, referred to the Full Bench, the question as to the construction to be placed on the term "the date of applying" used in art. 167,* sch. ii of Act IX of 1871.

ORDER OF REFERENCE.—This case turns on the construction to be placed on the term "the date of applying to the Court." Does that term mean the date on which an application is made, or can it be interpreted to mean any or the last day on which the application previously made was pending before the Court? The former construction may in many cases work great hardship, and is opposed to the construction placed by the Judicial Committee of the Privy Council on the language of the former Act [See *Mahtab Chund v. Bulram Singh* (13 Moore's Ind. Ap., 479)]. But grave as the injustice may be, we are constrained to give effect to the law if its terms are free from ambiguity. The point, however, is of such importance that we consider it should be determined by the Full Bench, and refer it accordingly.

[582] Pandit Bishambhar Nath and Mir Zahur Husain, for the Appellant.

Munshi Sukh Ram and Shah Asad Ali, for the Respondents.

The following Judgments were delivered by the Full Bench :—

Stuart, C.J.—It appears to me that the judgment of the Privy Council [see *Matab Chund v. Bulram Singh* (13 Moore's Ind. Ap., 479)], referred to has no application to the present case. That was a judgment under a totally different limitation law from that which we have now to consider. Section 20 of Act XIV of 1859 provided that "no process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force within three years next preceding the application for such execution." But the provisions of Act IX of 1871 are much more precise, for under No. 167 of the second schedule the time when the period of limitation begins to run is "the date of applying to

* [q. v. supra, 1 All., 185.]

the Court to enforce or keep in force the decree or order." I can quite understand that this may operate harshly in many cases, but the meaning is too plain, and it is that "the date of the applying to the Court" is the particular day on which the application is actually presented; and not the last or any other day on which the application was pending.

Pearson, J. —The date of applying must in my opinion be held to be the date of making application. But an application to enforce or keep in force may not be exclusively an application of the nature described in s. 212 of Act VIII of 1859 [see *Husain Baksh v. Madge* (I. L. R., 1 All., 525)].

Turner, J. —However inconvenient may be the construction, I feel bound by the plain terms of the Act to hold that the date of applying means not any day on which an application may be pending but a certain day, the day of its presentation; but the Court may not feel constrained to hold that by the term applying we are to understand only an application to execute the decree. Any application made to a Court during the pendency of proceedings in execution to enforce or keep in force the decree might be held to give a date from which limitation might be calculated, and I am confirmed in this view by the more explicit language of the Act recently passed [see *Husain Baksh v. Madge* (I. L. R., 1 All., 525)].

[583] Spankie, J. —I concur.

The case having been returned to the Division Court, the Court (after stating the facts) delivered the following

Judgment: —The period of three years must be computed from the date on which the last application to enforce the decree was filed. It cannot be said that the application of the 28th August 1872, was an application to enforce the decree. It was on the contrary an application for the suspension of the proceedings. Under the circumstances the Court below was right in holding the present application barred by limitation. The appeal is dismissed with costs.

NOTES.

【The date of the application is the starting point for limitation :—1 C. W. N., 260 ; 22 Bom., 722 ; 30 Cal., 761.

See also 10 C. L. J., 479 ; 14 I. C., 335】.

[1 All. 583]

FULL BENCH.

The 13th February, 1878.

PRESENT:

SIR ROBERT STUART, K.T., CHIEF JUSTICE, MR. JUSTICE PEARSON,
 MR. JUSTICE TURNER, AND MR. JUSTICE SPANKIE.

Wilayat-un-nissa.....Decree-holder

versus

Najib-un-nissa.....Judgment-debtor.*

*Execution of decree obtained on bond specially registered—Act XX
 of 1866 (Registration Act), ss. 52, 53, 54, 55—Appeal.*

Held (STUART, C. J., dissenting) that an appeal lies from an order passed in the execution of a decree obtained under the provisions of s. 53 of Act XX of 1866 upon a bond specially registered under the provisions of s. 52 of that Act.

Ramanand v. The Bank of Bengal (I.L.R., 1 All., 377) overruled. *Petition of Beharee* (7 W. R., 130) and *Hurnath Chatterjee v. Futtick Chunder* (18 W. R., 512) dissented from.

THIS was an application for the execution of a decree which had been obtained under the provisions of section 53¹ of Act XX of 1866 upon a bond specially registered under the provisions of s. 52 of that Act. The judgment-debtor objected that the application was barred by limitation, inasmuch as it was governed by art. 166, sch. ii of Act IX of 1871. The decree-holder contended that the application was within time, as it was governed by art. 167, sch. ii of Act IX of 1871. The Court of First Instance held that the period of limitation applicable was that provided in art. 166, *viz.*, one year, and not that provided in art. 167, *viz.*, three years, and, as [584] the period of one year had elapsed, rejected the application as barred by limitation.

On appeal by the decree-holder the lower Appellate Court also held that the period of limitation applicable was that provided in art. 166.

* Miscellaneous Special Appeal, No. 10 of 1877, from an order of H. M. Chase, Esq., Judge of Aligarh, dated the 27th November 1876, affirming an order of Maulvi Sami-ul-khan, Subordinate Judge of Aligarh, dated the 19th May 1876.

†[*q. r. supra*, 1 All. 236.]

‡[Art. 166 —

Description of application.	Period of limitation.	Time when period begins to run.
For the execution of a decision (other than a decree or order passed in a regular suit or an appeal) of a Civil Court or of a Revenue Court.	One year ...	The date of the decision, or of taking some proceeding to enforce or keep in force the decision.]

The decree-holder appealed to the High Court, contending that art. 167 governed the application. The Court (TURNER and OLDFIELD, JJ.) referred to the Full Bench the question whether an appeal would lie from an order made in the execution of a decree obtained under the provisions of s. 53 of Act XX of 1866 upon a bond specially registered under the provisions of s. 52 of that Act.

Lala Lalta Prasad, for the Appellant.

The Junior Government Pleader (*Babu Dwarka Nath Banarji*), for the Respondent.

The following **Judgments** were delivered by the Full Bench :—

Stuart, C. J.—The question submitted to the Court in this reference was raised almost under identical circumstances in a case before and decided by Mr. Justice OLDFIELD and myself—*Ramanand v. The Bank of Bengal* (I.L.R., 1 All., 377)—and to our ruling in that case I advisedly and deliberately adhere. Indeed, the reasoning that arrives at a different conclusion is, to my mind, after an experience of thirty years in the practice of the law, absolutely unintelligible.

The provision in s. 53 of Act XX of 1866 enacts that “such decree may be enforced forthwith under the provisions for the enforcement of decrees contained in the Code of Civil Procedure,” and this lets in the Code *so far as the enforcement of decrees* made under this portion of Act XX of 1866 is concerned, but it does not follow, and it is not the law, that this s. 53 lets in and enforces the *whole* provisions of the Code of Civil Procedure, Act VIII of 1859 relating to the execution of decrees. To hold otherwise would be, in effect, to render nugatory s. 55 of Act XX of 1866 which provides that “there shall be no appeal against any decree or order made under s. 53, s. 54, or this section.” *To that extent* therefore this section forbids the application of the Code of Civil Procedure, that is, so far as *appeals* are concerned, and only imports the Code [585] “for the enforcement of decrees.” The ruling of the Calcutta High Court therefore in 7 W. R. 130 and 18 W. R. 512 is clearly right.

It is suggested that the prohibition against appeals in s. 55 is intended only to apply to *orders* passed under that and the two previous sections, and not to decrees in course of execution under the Civil Procedure Code. But no such distinction is admissible in this case. The Civil Procedure Code, so far as it relates to the enforcement of decrees, is, by the sections in question, 53, 54, and the first part of s. 55, made part of Act XX of 1866, only limited by the proviso of the first part of s. 55, which takes away all appeals. In all other respects the Code of Procedure for the enforcement of decrees applies, and this is the meaning of Act XX of 1866 in regard to all decrees and *orders whatsoever* passed “in any proceeding under this part of the Act,” as s. 54 provides. The proceeding which is the subject of the reference before us is an order passed on an application for the execution of a decree under s. 53 of the Act, and the order of the Subordinate Judge was that the decree was barred by lapse of time, and this is clearly an order within the meaning of s. 55, which takes away all right of appeal whatever.

Pearson, J.—I am of opinion that the orders in execution of the decree given under s. 53 of Act XX of 1866 are not passed under that section, but under the Civil Procedure Code, which that section makes applicable to them, and are appealable under the Code.

Turner, J.—With every respect for the opinions of those learned Judges who have entertained a different view, I am of opinion that the words "there shall be no appeal against any decree or order made under ss. 53, 54, or this section," are to be construed as confined to decrees or orders passed under the express provisions of the sections of the Act, and that they do not prohibit appeals from orders passed when the decree is in course of execution under the provisions of the Procedure Code. It was evidently intended that in certain cases of special registration a bond-holder should be enabled to go to the Court and obtain an *ex parte* and final decree without having recourse to a suit. To carry out this intention the Legislature provided that the decree so passed should not be open to appeal. But to guard against hardship and injustice the law gave the Court which passed the decree powers to set aside its decree or stay execution, and declared those powers also should not be open to appeal.

[586] Where a person has executed a bond consenting at the time of registration that it should be registered in such a manner that the bond-holder may at once obtain a decree, it is intelligible that the law should declare the decree final unless the alleged executant of the bond could show cause why the decree should be stayed. But the reasons which induced the Legislature to declare such decrees and orders final do not extend to orders passed under the provisions of the Civil Procedure Code for the execution of such decrees. Construing the terms of s. 55 strictly, they do not deprive the parties to the decree of such rights of appeal as the Code of Civil Procedure declares to attach to orders in execution passed under the provisions of that Code.

It is a more difficult question whether the execution of the decrees obtained under the Registration Act, 1866, is governed by cl. 166 or cl. 167, sch. ii of the Limitation Act, 1871. They are not mere decisions of a Civil Court, but on the other hand they are not decrees or orders passed in a regular suit. They are decrees passed without the formalities prescribed for regular suits. They resemble decrees passed on awards filed under the provisions of the Procedure Code. It has, I believe, never been doubted that the execution of decrees passed on awards is governed by cl. 167 and not cl. 166, and I consider that cl. 167 is equally applicable to decrees obtained under the special provisions of the Registration Act of 1866.

Spankie, J.—I concur in the views expressed by Mr. Justice TURNER on the point expressly referred to.

NOTES.

[See 1 All. 586 F.B.; 5 Bom. 673 F.B.]

[1 All. 586]
FULL BENCH.

The 23rd January, 1878.

PRESENT:

SIR ROBERT STUART, Kt., CHIEF JUSTICE, MR. JUSTICE PEARSON
MR. JUSTICE TURNER, AND MR. JUSTICE SPANKIE.

Jai Shankar and another.....Decree-holders

versus

Tetley.....Judgment-debtor.*

Execution of decree obtained on bond specially registered—Act XX of 1866 (Registration Act), ss. 52, 53—Limitation—Act IX of 1871 (Limitation Act), sch. ii, arts. 166, 167.

Held that art. 167, and not art. 166, sch. ii of Act IX of 1871, applies to an application for the execution of a decree made under the provisions of s. 58 of Act [587] XX of 1866 upon a bond specially registered under the provisions of s. 52 of that Act.

THIS was an application for the execution of a decree which had been obtained under the provisions of s. 53 of Act XX of 1866 upon a bond specially registered under the provisions of s. 52 of that Act. The judgment-debtor objected that the application was governed by art. 166, sch. ii of Act IX of 1871, and was barred by limitation, and also that, even if it were governed by art. 167 of the same schedule, it was barred by limitation. The Court of First Instance held that the application was barred by limitation under art. 166 and also under art. 167, sch. ii of Act IX of 1871.

The decree-holders appealed to the High Court, contending that art. 166, sch. ii of Act IX of 1871, was not applicable; that even if it were, the application was within time; and that art. 167 was applicable, and the application was within the time prescribed by the same.

The Court (STUART, C. J., and TURNER, J.) referred to the Full Bench the question whether the application was governed by art. 166 or art. 167, sch. ii of Act IX of 1871.

Mr. Conlan, Pandit Ajudhia Nath, and Munshi Sukh Ram, for the Appellants.

Mr. Dillon and Mir Akbar Husain, for the Respondent.

The following Judgments were delivered by the Full Bench:—

Stuart, C.J.—I agree with the other members of the Court that the appeal in this case must be allowed. Article 167, sch. ii of Act IX of 1871 clearly applies and governs the case, and the application therefore is not barred.

Pearson, J.—In my opinion the appeal lies. The law of limitation applicable to the case appears to be art. 167, sch. ii of Act IX of 1871. Article 166 is not applicable, for execution is not sought of a decision but of a decree. The application is clearly within three years of preceding applications to enforce or keep in force the decree, and is therefore not barred.

* Miscellaneous Regular Appeal, No. 34 of 1877, from an order of Maulvi Sami-ul-la Khan, Subordinate Judge of Aligarh, dated the 16th April 1877.

Turner, J.—It is admitted at the bar that the application is not barred by limitation, if the application is governed by art. 167, sch. ii of Act IX of 1871. There were clearly applications sufficient [588] to keep the decree alive made within three years before the present application was presented. That the application is governed by the provisions of that article I have held in Miscellaneous Special Appeal No. 10 of 1877 (see *Wilayat-un-nissa v. Najib-un-nissa*, *ante* p. 583). The order of the Court below must be reversed, and the proceedings returned to that Court that the application may be disposed of on the merits. The costs of this appeal should abide and follow the result.

Spankie, J.—I concur in the view expressed by Mr. Justice TURNER.

NOTES.

[See 5 Bom. 679.]

[1 All. 588]

APPELLATE CIVIL.

The 4th February, 1878.

PRESENT :

MR. JUSTICE PEARSON, AND MR. JUSTICE OLDFIELD.

Ali Shah.....Plaintiff

versus

Husain Bakhsh and another.....Defendants.

Sale in execution of decree—Auction purchaser—Lis pendens—Res judicata—Act VIII of 1859 (Civil Procedure Code, s. 2).

A, the auction-purchaser of certain immovable property at a sale in execution of a decree, purchased with notice that a suit by *H* and *M* against the judgment debtor and the decree-holder for a share in such property was pending, but did not intervene in such suit. Before the sale to *A* was made absolute, *H* and *M* obtained a decree in the suit for a moiety of the share claimed by them. *A* took no steps to get such decree set aside, but sued them to establish his right to such moiety in virtue of his auction-purchase. It appeared that the Court which passed the decree in favour of *H* and *M* did so without jurisdiction. Held that, inasmuch as the suit in which such decree was made was tried and determined by a Court having no jurisdiction, it could not be held that *A* was bound to intervene in it and dispute the claim preferred therein, or that he was bound by such decree, and that it could not be said that *A* was bound to take steps to get such decree set aside by means of appeal, or that because he had omitted to do so, it had become binding on him, and his suit was precluded.

Quare, whether doctrine of *lis pendens* applies in the case of a purchase in execution of decree.

THIS was a suit for possession of a one biswa ten biswansis share in a certain village. This share was included in an eight-biswas share which belonged to two brothers, Khoda Bakhsh and Ghulam Husain. Khoda Bakhsh pro-deceased Ghulam Husain, leaving a [589] widow, Rajbibi, and a son, Ali Bakhsh.

* Second Appeal, No. 1183 of 1877, from a decree of S. Melville, Esq., Judge of Meerut, dated the 19th June 1877, affirming a decree of Babu Kushi Nath Biswas, Subordinate Judge of Meerut, dated the 7th September 1876.

Before his death Khoda Bakhsh conveyed to Rajbibi his rights and interests in this property in lieu of dower. In July 1863, Rajbibi obtained possession of a portion of the property in execution of a decree obtained by her against her son. While Rajbibi was in such possession, she borrowed money from one Behari Lal, charging the whole property with the payment of the money borrowed. Behari Lal sued Rajbibi to recover this money and obtained a decree against her. In execution of this decree the whole property was attached and advertised for sale. Husain Bakhsh and Muhammad Ali, the sons of a daughter of Ghulam Husain, preferred a claim to the share in the property of their maternal grandfather, but their claim was disallowed. They accordingly sued Behari Lal and the legal representatives of Rajbibi, who had meantime died, in the Munsif's Court to establish their right to, and obtain possession of, a three-biswas share out of the eight biswas, applying to the Munsif at the time of instituting the suit, for a postponement of the sale of so much of the property. The Munsif requested the Court executing the decree to postpone the sale of a three-biswas share, but that Court refused to do so. It, however, notified at the sale that such a suit was pending. The property was sold and was purchased by Ali Shah, the plaintiff in the present suit. After his purchase, but before the sale was confirmed, the Munsif gave Husain Bakhsh and Muhammad Ali a decree against Behari Lal and the legal representatives of Rajbibi for a moiety of their claim, which decree was eventually affirmed by the High Court. Ali Shah did not intervene in this suit, nor did he take any steps to get the decree set aside. He now claimed possession of the moiety for which Husain Bakhsh and Muhammad Ali had obtained a decree in virtue of his auction-purchase. The Court of First Instance held that the doctrine of *lis pendens* was applicable to the suit, and the plaintiff was bound by the judgment of the Munsif in the suit brought by Husain Bakhsh and Muhammad Ali, and dismissed his suit. On appeal by the plaintiff the lower Appellate Court concurred in this ruling.

On special appeal by the plaintiff to the High Court it was contended by him that the doctrine of *lis pendens* was not applicable; and that, as the value of a three-biswas share of the property exceeded Rs. 1,000, the Munsif's decree was made without jurisdiction, and under these circumstances the plaintiff was not bound to take notice of the suit nor was he affected by the decree.

Munshi Hanuman Prasud, Babu Oprokash Chandar, and Jogindro Nath Chaudhri, for the Appellant.

Pandit Bishambhar Nath, for the Respondents.

The Judgment of the Court was delivered by

Pearson, J.—It seems to us very doubtful whether the doctrine of *lis pendens* applies in this case. The decree passed by the Munsif in the suit brought by the heirs of Ghulam Husain against the heirs of Rajbibi and her decree-holder, Behary Lal, was passed before the present plaintiff had acquired a title to the rights and interests of Rajbibi aforesaid as auction-purchaser by the confirmation of the auction-sale. Moreover, that doctrine appears to be applicable to cases in which the alienation is of a voluntary nature, and not to an alienee who has bought a property sold in execution of a decree. * Doubtless also there is irresistible weight and force in the last ground of appeal. The rights and interests purchased by the plaintiff at auction-sale, which may be assumed to represent an eight-biswas share, fetched a price of

* See, however, *Manual Fruval v. Sanagapalli*, 7 Mad. H. C. Rep. 104, where the doctrine was applied in the case of a sale in execution of a decree *pendente lite*.

Rs. 15,000. The one and a half biswa claimed in the present suit is valued at Rs. 2,784-6-0. It cannot then be doubted that the value of the three biswas claimed in the suit of Ghulam Husain's heirs exceeded Rs. 1,000, and that the suit was not cognizable by the Munsif. It would be unreasonable to hold that the present plaintiff was bound to intervene in that suit, and to dispute the claim preferred in a Court which had not jurisdiction to dispose of the matter. We must find that he cannot be bound by a decree which is patently invalid, and for that reason could not bind even the parties to the suit in which it was passed. The question which was tried and determined in that suit is not a *res judicata*, because the Court which determined it was not a Court of competent jurisdiction, and is therefore open to be adjudicated in the present suit. The decree passed in that suit being invalid for want of jurisdiction and nullity, we cannot say that the present plaintiff, as successor in title to Rajbibi, was bound to take steps to get it set aside by means of appeal, or that, because he omitted to [591] do so, it has become binding upon him, and that he is precluded from bringing this suit. Accordingly we set aside the decrees passed by the lower Courts in this suit, and remand it to the Court of First Instance under ss. 562² and 587¹ of Act X of 1877 for disposal on the merits, with a direction that the costs of the parties in all the Courts shall follow the result.

Cause remanded.

NOTES.

[Followed in 10 Bom. 400; see, however, 14 Mad. 491: also 28 Bom. 379.]

[1 All. 591]

APPELLATE CIVIL.

The 6th February, 1878.

PRESENT:

MR. JUSTICE PEARSON, AND MR. JUSTICE TURNER.

Durga Prasad and another.....Plaintiffs
versus

Nawazish Ali and another.....Defendants.¹

Pre-emption—Conditional decree.

Where the plaintiff in a suit to enforce the right of pre-emption sued alleging that the actual price of the property was not the price entered in the sale-deed but a smaller price,

*[Sec. 562 :—If the Court against whose decree the appeal is made has disposed of the suit upon a preliminary point so as to exclude any evidence of fact

Remand of case by which appears to the Appellate Court essential to the determination of the rights of the parties, and the decree upon such preliminary point is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, together with a copy of the order in appeal, to the Court against whose decree the appeal is made, with directions to re-admit the suit under its original number in the register and proceed to investigate the suit on the merits. The Appellate Court may, if it think fit, direct what issue or issues shall be tried in any case so remanded.]

Provisions as to second appeals apply as far as may be to appeals under this Chapter, and to the execution of decrees passed in such appeals.]

† Second Appeal, No. 1212 of 1877, from a decree of C. J. Daniell, Esq., Judge of Mainpuri, dated the 15th September 1877, affirming a decree of Maulvi Hamid Hasan Khan, Subordinate Judge of Mainpuri, dated the 19th July 1876.

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and claimed the property on payment of such smaller price, and did not allege that he was ready and willing to pay any price which the Court might find to be the actual price, and on the day that his suit was finally disposed of, presented an application to the Court stating that he was ready and willing to do so, held that the Court was bound to allow him to amend his plaint and bring into Court the larger sum.*

THIS was a suit to enforce the plaintiffs' right of pre-emption, in respect of a share in a certain village, the suit being founded upon a specific agreement contained in the village administration-paper. The plaintiffs claimed the right on payment of Rs. 1,800, which sum they alleged was the actual price paid for the property, and not Rs. 2,790, the price entered in the deed of sale. They did [592] not state in their plaint that they were willing to pay any sum that might be found to be the actual price of the property. The suit was instituted on the 20th November 1875. On the 13th July 1876, the date on which the Court of First Instance finally disposed of the suit, they made an application to that Court offering to pay whatever sum the Court might adjudge to be the actual price. The Court refused to entertain this application; and finding that the actual price of the property was Rs. 2,790, dismissed the suit. On appeal by the plaintiffs the lower Appellate Court affirmed the decision of the Court of First Instance.

On second appeal by the plaintiffs to the High Court, they contended that they were entitled to a conditional decree, having offered before the suit was decided to pay any sum that might be adjudged to be the actual price of the property.

Mr. Mahmood and Pandit Ajudhia Nath, for the Appellants.

Mr. Colvin, Pandit Bishambhar Nath, and Lala Ram Prasad, for the Respondents.

The Judgment of the Court was delivered by

Turner, J.—We cannot hold as a matter of law that the Court of First Instance was bound to allow the plaintiff to amend his plaint, and to bring in the very much larger sum which he should have offered to pay when he brought his suit. The appeal fails and is dismissed with costs.

Appeal dismissed.

NOTES.

[See 3 All. 753.]

* See also *Kudhara v. Khuman Singh*, H. C. R., N.-W. P., 1866, p. 265, and *Achurbur Panday v. Buckshee Ram*, 2 W. R. 38. In the first case the person claiming the right of pre-emption refused to give a certain sum for the property on the ground that a certain smaller sum was the actual price, and sued to enforce his right on payment of such smaller sum. It was held that, it having been found that the larger sum was the actual price, the plaintiff's suit was properly dismissed. In the second case the plaintiff not only sued to enforce his right of pre-emption on payment of a specific sum, but in respect also of a specific property. The right alleged being found to have no existence, his suit was properly dismissed. See also *Madhub Chunder v. Tomee Bewah*, 7 W. R. 210, in which case also the principle that a person claiming the right of pre-emption must take the bargain as it was made or not at all, is recognised.

[1 All. 592]

APPELLATE CIVIL.

The 11th February, 1878.

PRESENT:

MR. JUSTICE TURNER AND MR. JUSTICE OLDFIELD.

Bijai Ram.....Defendant

versus

Kallu.....Plaintiff.*

Pre-emption—Limitation—Act IX of 1871 (Limitation Act), sch. ii, art. 10.

In 1861 *B* purchased conditionally certain immoveable property, which in 1865 was attached in execution of a decree. In 1874, the conditional sale having been foreclosed, *B* obtained a decree for possession of such property. In February 1875, he obtained mutation of names in respect of such property.

[593] In November 1875, arrangements having been made by him to satisfy the decree in execution of which such property had been attached, the attachment was removed. In December 1875, he acknowledged having received possession of such property in execution of his decree. *K* sued him in November 1876, to enforce his right of pre-emption in respect of such property. Held, that limitation ran from the date when *B* obtained such possession of the status of his conditional vendor as entitled him to mutation of names and to the exercise of the rights of an owner, and that the suit was barred by limitation. The principle laid down in *Jageshar Singh v. Jawahir Singh* (I. L. R., 1 All., 311) followed.

THIS was a suit to enforce the plaintiff's right of pre-emption in respect of a certain share in a certain village, the right being founded upon custom and upon a special agreement contained in the village administration-paper. The cause of action was stated in the plaint to have arisen on the 17th December 1875, when the defendant, vendee, obtained possession of the property. The suit was instituted on the 16th November 1876. The defendant set up as a defence to the suit that it was barred by limitation. It appeared that the property was conditionally sold to the defendant under a deed dated the 10th September 1861. On the 29th March 1865, the property was attached in execution of a decree. On the 7th November 1868, under proceedings taken by the defendant under the conditional sale, notice of foreclosure was issued to the conditional vendor. On the 4th July 1874, the conditional sale having been foreclosed, the defendant obtained a decree for possession of the property. On the 5th February 1875, he obtained mutation of names in respect of the property. On the 18th November 1875, arrangements having been made by him to satisfy the decree under which the property had been attached on the 29th March 1865, the property was released from attachment. On the 17th December 1875, he acknowledged that he had received possession of the property in execution of the decree dated the 4th July 1874. The Court of First Instance held, with reference to the case of *Jageshar Singh v. Jawahir Singh* (I. L. R., 1 All., 311), that the suit was within time, as the property did not vest in the defendant till the 17th December 1875, and gave the plaintiff a decree.

* Second Appeal, No. 1145 of 1877, from a decree of C. A. Daniell, Esq., Commissioner of Jhansi, dated the 20th July 1877, affirming a decree of J. S. Porter, Esq., Deputy Commissioner of Jhansi, dated the 7th April 1877.

On appeal by the defendant the lower Appellate Court concurred in the view taken by the Court of First Instance of the question of limitation and affirmed the decree.

[594] On second appeal by the defendant to the High Court it was contended that, with reference to the principle laid down in the case cited above, the suit was barred by limitation.

Munshi *Hanuman Prasad* for the Appellant.

Mr. *K. M. Chatarji* for the Respondent.

The Judgment of the Court was delivered by

Turner, J.—The principle laid down in the Full Bench judgment of the Court (I. L. R., 1 All., 311) governs this case. The appellant was not bound to discharge the debts in respect of which the property was attached immediately he had obtained his decree confirming the sale. He took such possession as he then could obtain. The appellant, having established his title, carried his decree to the revenue office, and got his name entered in substitution for that of the former owner, and having obtained such possession as the nature of the property admitted, he then set himself to discharge the incumbrances for which it was under attachment. Limitation in such a case runs from the date when he obtained possession of the status of the owner sufficient to enable him to procure mutation and to exercise the rights of an owner. The appeal is decreed, the decrees of the Courts below reversed, and the suit dismissed with costs.

Appeal allowed.

NOTES.

[On this point see also 20 All. 315; 3 All. 770; 24 All. 17.]

[1 All. 594]

APPELLATE CIVIL.

The 13th February, 1878.

PRESENT:

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR. JUSTICE PEARSON.

Ruka Bai.....Plaintiff

versus

Ganda Bai.....Defendant.*

Hindu Law—Decree for maintenance—Suit for reduction of maintenance.

A Hindu lady obtained a decree awarding her maintenance at a certain fixed rate and charging the assets of a certain firm with the payment of such maintenance. There was no provision in this decree that such rate was subject to any modification which future circumstances might render necessary. The assets of such firm having diminished, the proprietor of the

*Second Appeal, No. 1290 of 1877, from a decree of C. A. Daniell, Esq., Commissioner of Jhansi, dated the 22nd August 1877, reversing a decree of J. V. Stuart, Esq., Assistant Commissioner, dated the 12th May 1877.

same brought a suit [595] for the reduction of such rate of maintenance. Held that such suit was maintainable.*

THIS was a suit in which the plaintiff claimed the reduction of an allowance payable by her to the defendant out of the assets of a firm of which she was the proprietor. One Gulab Rai, the head of a joint and undivided Hindu family, carried on business under the style of Gulab Rai Chura Mal. The defendant in this suit, who was the daughter of Gulab Rai, obtained a decree in 1876 which awarded her as maintenance an allowance of Rs. 30 per mensem so long as the firm of Gulab Rai Chura Mal should exist. The present suit was brought by the widow of Munna Lal, son of Gulab Rai, as the proprietor of the firm, for the reduction of this allowance on the ground that the business of the firm of Gulab Rai Chura Mal was gradually failing. The Court of First Instance gave the plaintiff a decree directing that the defendant's allowance should be reduced to Rs. 20 per mensem, intimating that if the business of the firm of Gulab Rai Chura Mal improved, the defendant would be entitled to claim an increase in her allowance. The lower Appellate Court, on appeal by the defendant, dismissed the suit as unmaintainable, on the ground that the plaintiff had no cause of action.

The plaintiff preferred an appeal to the High Court.

The Junior Government Pleader (Babu Dwarka Nath Banarji), with him Pandit Ajudhia Nath, for the Appellant, contended that the suit was maintainable. At the time the defendant's allowance was fixed at Rs. 30 per mensem, and made a charge on the assets of the firm, those assets were capable of meeting such a charge without detriment to the firm. The plaintiff has shown that the assets are not now capable of meeting the charge without detriment to the firm, and is therefore entitled in equity to a reduction of the allowance. The Mofussil Courts being Courts of equity can entertain the suit. There is no law prohibiting such a suit. In an administration suit there is always a direction in the decree that [596] the parties to the suit may apply to the Court from time to time as they may be advised touching the estate of which administration is sought.

Munshis Hanuman Prasad and Sukh Ram for the Respondent.

The Judgment of the Court was delivered by

Pearson, J.—The appeal must prevail. The diminution of the income of the estate on which the defendant's income is chargeable, since her allowance was fixed, is obviously a sufficient cause for the present action of which the object is the reduction of the allowance formerly fixed. It would be unreasonable to hold that, even if the income of the estate should come to an end altogether, that allowance should still continue; and therefore it must be liable to be reduced in proportion to the existing income. We set aside the lower Appellate Court's decree and remand the case to it for fresh disposal on the merits, with a direction that the costs of this appeal shall follow the result.

Appeal allowed.

NOTES.

[The rate of maintenance may be varied according to the circumstances:—(1902) 26 Bom. 307; (1900) 24 Bom. 386; (1899) 22 Mad. 175; (1889) 12 Mad. 183; (1884) 8 Mad. 94.]

* In *Ram Kulle Koer v. The Court of Wards*, 18 W. R., 474, and *Nubo Gopal Roy v. Sreemuttee Amrit Moyee Dossee*, 24 W. R., 428, the principle is recognised that the rate of maintenance fixed by a decree is subject to any modification which future circumstances may render necessary. In the first mentioned case, however, it was held that such modification should be made by review of judgment.

[1 All. 596]

APPELLATE CIVIL.

The 15th February, 1878.

PRESENT:

MR. JUSTICE PEARSON AND MR. JUSTICE SPANKIE.

Gulzari Lal and others.....Defendants

versus

The Collector of Bareilly.....Plaintiff.*

Act VIII of 1859 (Civil Procedure Code), ss. 270-309—Pauper suit—Attachment in execution of decree—Court Fees—Prerogative of the Crown.

N was allowed to bring a suit as a pauper. His suit was dismissed, the decree directing that he should pay the costs of the defendant. On the defendant's application certain immovable property belonging to N was attached in execution of this decree, and was sold. Held that the Crown was entitled to be paid first out of the proceeds of such sale the amount of the Court fees N would have had to pay if he had not been allowed to sue as a pauper. The principle of the ruling in *Ganpat Putaya v. The Collector of Kanara* (I. L. R., 1 Bom., 7) followed.

THIS was a suit for Rs. 84-2-0. One Nait Lal had sued Gulzari Lal and certain other persons, defendants in this suit, in *forma [597] pauperis*. His suit was dismissed by the Court of First Instance with costs. He appealed, and his appeal was dismissed and the decree of the Court of First Instance affirmed with costs. Gulzari Lal and the other persons applied to recover, in execution of these decrees, the sum of Rs. 787, being the costs incurred by them in defending the suit, and certain houses belonging to Nait Lal were accordingly attached. Subsequently, on the application of the Collector of the District, the Court executing the decrees ordered that the property should be sold in satisfaction of the amount which Nait Lal would have had to pay as Court fees had he not been allowed to sue and appeal as a pauper, *viz.*, Rs. 530-8-0, as well as in satisfaction of the demand of Gulzari Lal and the other persons, and that the Collector should be paid first out of the sale proceeds. The property was sold and realized Rs. 155. After the confirmation of the sale the Court made another order under which the Collector and Gulzari Lal and the other persons were paid out of the sale proceeds rateably; the former getting Rs. 62-2-0, the latter Rs. 84-2-0. The present suit was brought by the Collector to contest this order. The Court of First Instance dismissed the suit, holding that, under s. 270 of Act VIII of 1859, the defendants were entitled as attaching creditors to be first paid out of the sale proceeds. It distinguished the present case from that of *Ganpat Putaya v. The Collector of Kanara* (I. L. R., 1 Bom., 7) on the ground that in the present case, the pauper suit had been dismissed. On appeal by the plaintiff the lower Appellate Court held that the principle laid down in the Bombay case applied, and gave the plaintiff a decree.

* Second Appeal, No. 1142 of 1877, from a decree of W. Tyrrell, Esq., Judge of Bareilly, dated the 10th July 1877, reversing a decree of Muhammad Mubarik Baz Khan, Officiating Munsif of Bareilly, dated the 9th January 1877.

The defendants appealed to the High Court, contending that the decision of the lower Appellate Court was opposed to the provision of s. 270^{*} of Act VIII of 1859, under which they were entitled as attaching creditors to be paid first out of the sale-proceeds; and that the case relied on by the lower Appellate Court was not applicable.

Munshi *Hanuman Prasad* for the Appellants.

The Senior Government Pleader (*Lala Juala Prasad*) for the Respondent.

[598] The following **Judgment** was delivered by the Court:—

Pearson, J.—The principle of the ruling of the Bombay Court (I. L. R., 1 Bom. 7), on which the lower Appellate Court has relied, appears to us to be reasonable and we decline to interfere.

Appeal dismissed.

NOTES.

[See also 33 Cal. 1040.]

[1 All. 598]

APPELLATE CIVIL.

The 15th February, 1878.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR. JUSTICE PEARSON.

Abasi.....Plaintiff

versus

Dunne.....Defendant.†

Custody of minor—Guardian—Muhammadan Law.

Held, where the plaintiff sued for the custody of her minor sister as her legal guardian under the Muhammadan law, that the fact of the plaintiff being a prostitute was, although she was legally entitled to the custody of such minor, a sufficient reason for dismissing the suit in the interests of such minor.

THIS was a suit for the custody of the plaintiff's minor sister, Chittan, the suit being based on the plaintiff's right of guardianship under Muhammadan law. In November 1871, the Sessions Judge of Cawnpore tried a case in which the plaintiff in this suit, who was a prostitute by profession, had charged another prostitute with obtaining possession of Chittan for the purposes of prostitution. The accused was acquitted by the Sessions Judge, with an injunction to the Magistrate of the district to make suitable arrangements for the welfare of the

*[Sec. 270 :—Whenevor a property is sold in execution of decree the person on whose application such property was attached first paid out of property shall be entitled to be first paid out of the proceeds thereof, notwithstanding a subsequent attachment of the same property by another party in execution of a prior decree.]

† Special Appeal, No. 1812 of 1877, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 30th August 1877, affirming a decree of Munshi *Lalha Prasad*, Munsif of Cawnpore, dated the 9th January 1877.

minor. The Magistrate procured Chittan's admission to the Ghuttia Orphanage at Cawnpore. The present suit was instituted against the Magistrate and the Superintendent of the Orphanage. The lower Courts dismissed the suit on the ground that the plaintiff, being a prostitute, was not a proper person to have the custody of the minor.

The plaintiff appealed to the High Court, contending that under Muhammadan law she was the legal guardian of the minor and therefore entitled to the custody of her person.

Maulvi Obeidul Rahman, Mir Akbar Husain, and Mir Zahur Husain, for the Appellant.

[599] The Senior Government Pleader (*Lala Juala Prasad*), for the Respondent.

The Judgment of the Court was delivered by

Pearson, J.—The claim in this suit was simply for the recovery of the minor, Chittan, from the custody of the Government; and the fact that the plaintiff is a prostitute, and therefore an unfit person to have the charge of the girl, seems to be a sufficient reason for dismissing the claim in the interest of the minor. It may be admitted that the plaintiff would, under the Muhammadan law, be *prima facie* entitled to the guardianship of her younger sister, were her fitness for the charge established; but her own bad character and manner of life must be held to disqualify her; and we must affirm the decree of the lower Courts dismissing her suit. It is stated in the plaint that the tenets of Christianity are being imparted to the minor at the Orphanage at which she has been placed by the Magistrate, and that "in bringing her claim, the plaintiff prays that the Court, after satisfying itself that the plaintiff would not bring up the minor in her own trade of prostitution, and that she would marry her according to Muhammadan law, may order the minor to be given to her." But it is difficult to see how the minor, if made over to her, could be secured from the evil effects of her example, influence, and association. The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[See also (1888) 12 Mad. 69; 26 All., 594.]

[1 All. 599]

CRIMINAL JURISDICTION.

The 15th February, 1878.

PRESENT :

MR. JUSTICE TURNER, AND MR. JUSTICE SPANKIE.

Empress of India
versus
 Mulua.

*Regulation IV of 1797, s. 3—Act XLV of 1860 (Indian Penal Code), s. 302—
 Act VI of 1861,—Act XVII of 1862, ss. 1, 2, 4—Act I of 1868 (General
 Clauses Act), ss. 3, 6—Act VIII of 1868—Act X of 1872
 (Criminal Procedure Code).*

Up to the 1st January 1862, a person committing the offence of murder was liable to trial and punishment under the Regulations. By Act XVII of 1862, the Regulations prescribing punishments for offences were repealed "except as to any offence committed before the first January 1862." By the same Act it was declared that no person who should claim the same should be deprived of any right of appeal or reference which he would have enjoyed under such Regulations. By s. 6 of Act I of 1868 the repeal of an [600] Act does not affect any thing done, or any offence committed, or any fine or penalty incurred before the repealing Act shall have come into operation. Under the provisions of this section the repeal of Act XVII of 1862 by Act VIII of 1868 and Act X of 1872 did not, in respect of offences committed before the 1st January 1862, affect the penalties prescribed by such Regulations, nor were any of the Regulations prescribing punishments for offences, which were in force before the passing of Act XVII of 1862, repealed in respect of offences committed before the 1st January 1862, prior to the passing of Act I of 1868.

Held accordingly, where a person committed murder in the year 1855, that such person was punishable under the Regulations.

Held also that, inasmuch as such a right as the right of reference given by s. 3 of Regulation IV of 1797 accrues on conviction, and therefore in the present case had not accrued before Act XVII of 1862 was repealed, it is doubtful whether a person convicted of murder committed before the 1st January 1862, has such right.

THE facts of this case are sufficiently stated for the purposes of this report in the Judgment of the High Court, which was delivered by

Turner, J.—The prisoner was charged with the offence of murder committed in the year 1855. On that charge he was tried by the Judge of Fatehgarh and convicted and sentenced, under the Regulation in force before the 1st January 1862, to transportation for life. The Judge has submitted the sentence for confirmation, and at the same time has called the attention of the Court to a Full Bench ruling of the High Court of Calcutta [*Empress v. Diljour Misser* (I. L. R., 2 Cal., 225)], in which it has apparently been held that a person who has committed an offence prior to the 1st January 1862 could not now be legally convicted and sentenced. We say apparently it was so held, because such was the opinion expressed by the learned Judges before whom the case was originally heard, and although the judgment of the Full Bench proceeds on grounds

which do not necessarily involve that conclusion, the conviction was pronounced illegal and set aside.

Up to the 1st January 1862, the law under which persons were liable to trial and punishment for the offence of which the prisoner has been convicted was declared in the Regulations. On the 1st January 1862, the Indian Penal Code came into operation, for although in the Code itself the date on which it should [601] take effect was declared to be the 1st May 1861, that date was altered by the subsequent Act VI of 1861. By Act XVII of 1862, ss. 1 and 2, the Regulations and Acts prescribing punishments for offences were repealed from the 1st January 1862, "*except as to any offence committed before the 1st January 1862.*" In respect of those parts of India in which the Code of Criminal Procedure came into operation on the 1st January 1862, the Acts and Regulations theretofore regulating procedure in the trial of offences were by s. 4 of the same Act, XVII of 1862, repealed; and it was declared that thereafter the Criminal Courts should be guided by the Code of Criminal Procedure and exercise the powers and jurisdiction vested in them under the said Code, provided that no person convicted of an offence committed before the 1st January 1862 should be liable to any other punishment in respect of such offence than that to which he would have been liable had he been convicted of such offence before the said first day of January 1862, and that no person who should claim the same should be deprived of any right of appeal or reference to a Sudder Court which he would have enjoyed under any of the Regulations or Acts thereby repealed.

The effect then of Act XVII of 1862 was this; it left the Regulations and Acts under which offences were therefore punishable unrepealed in respect of an offence committed before the 1st January 1862; and while it declared that the Criminal Courts should in the investigation and trial of offences be thereafter guided by the provisions of the Code of Criminal Procedure, and enjoy the powers and jurisdiction conferred on them by that Act, it saved offenders guilty of offences committed before the 1st January 1862 from liability to any other punishment in respect of such offences than that to which they would have been amenable under the repealed Regulations and Acts, and secured to them the same rights of reference and appeal to a Sudder Court which they would have enjoyed if they had been tried under the Regulations and Acts thereby repealed.

By the General Clauses Act I of 1868, s. 3, it is provided that in all Acts made by the Governor-General in Council for the purpose of reviving either wholly or partially a Statute, Act, or [602] Regulation repealed, it shall be necessary expressly to state such purpose, and by s. 6 of the same Act it is enacted that the repeal of any Statute, Act, or Regulation shall not affect any thing done or any offence committed, or any fine or penalty incurred before the repealing Act shall have come into operation. By the repealing Act VIII of 1868 the 1st, 2nd and 7th sections of Act XVII of 1862 were repealed, and by Act X of 1872 the sections of the Act then unrepealed were also repealed. There being no express words to that effect, the repeal of Act XVII of 1862 of course did not revive the Regulations in so far as they had been repealed by the Act, but neither did it operate to repeal those Regulations in so far as they were not repealed by the Act. Thus in respect of offences committed prior to the 1st January 1862, the penalties prescribed by the regulations were not affected by the repeal of Act XVII of 1862, nor so far as we can discover, were any of the Regulations prescribing punishments for offences, which were in force before the passing of Act XVII of 1862, repealed in respect of offences committed before the 1st January 1862, prior to the passing of the General Clauses Act I of 1868.

We agree with the High Court of Calcutta that a person could not be convicted of an offence committed prior to the 1st January 1862, under Act XVII of 1862, and for this reason, that that Act was a repealing Act and not an Act providing for the punishment of such offences. But it is another question whether persons who have committed offences prior to the 1st January 1862 are not amenable to punishment under the Regulations. To the several repealing Acts passed since the General Clauses Act came into operation, the provisions of s. 6 of the General Clauses Act apply, and the repeal of the Regulation subsequently to the passing of the Act does not relieve offenders from the penalties to which they were liable under the Regulations.

It is a more difficult question whether the right of reference remains after the repeal of Act XVII of 1862. That right had not accrued before the Act was repealed, for it accrued on conviction, and the conviction did not take place till after the repeal of Act XVII of 1862; but to avoid any illegality by the omission of confirmation if it be still required, we have considered the case on the [603] merits and hold the conviction justified by the evidence and the sentence not improper. We therefore confirm it.

Conviction affirmed.

[1 ALL. 603]

APPELLATE CIVIL.

The 19th February, 1878.

PRESENT :

SIR ROBERT STUART, K.T., CHIEF JUSTICE, AND MR. JUSTICE SPANKIE.

Baldeo Panday.....Plaintiff

versus

Gokal Rai.....Defendant.*

Bond --Interest.

G gave *B* a bond for the payment of certain money within a certain time, with interest at the rate of 1 $\frac{1}{4}$ per cent. per mensem, in which he agreed that, in case of default, the obligee "should be at liberty to recover the principal money and interest from his person and property" and mortgaged "his four-anna share in mauza *K* until payment of the principal money and interest." *Held* that the bond contained an express contract for the payment of interest after due date at the rate of 1 $\frac{1}{4}$ per cent. per mensem, and that such contract was enforceable.

Seemle that, where there is no express agreement fixing the rate of interest to be paid after the date a bond becomes due, an agreement to pay at the rate of interest agreed to be paid before such date cannot be implied, but the Court must determine what would be a reasonable rate to allow. In such a case the rate agreed to be paid before such date may ordinarily be regarded as the rate to be allowed after such date, provided that the rate agreed to be paid before such date is not excessive.

THIS was a suit for money charged on immoveable property by a bond. This bond was dated the 8th January 1872, and the plaintiff claimed to recover thereunder Rs. 1,913-11-0, principal and interest. The suit was instituted on

* Second Appeal, No. 1076 of 1877, from a decree of J. W. Power, Esq., Judge of Ghazipur, dated the 6th September 1877, modifying a decree of Maulvi Zain-ul-Abdin, Additional Subordinate Judge of Ghazipur, dated the 28th May 1877.

the 11th May 1877. The facts of the case are sufficiently stated for the purposes of this report in the judgments of the High Court, to which the plaintiff appealed against the decree of the lower Appellate Court.

Munshi *Kashi Prasad* and Shah *Asad Ali* for the Appellant.

Mr. *J. E. Howard*, the Senior Government Pleader (*Lala Juala Prasad*), and Pandit *Bishambhar Nath* for the Respondent.

The following Judgments were delivered by the Court :—

Stuart, C. J.—In this case I think the appeal must be allowed. I am not sure that I quite follow the Subordinate Judge in the [604] reasons he assigns for his judgment, but his order is clearly right and ought to be restored. The Judge, on the other hand, is as clearly wrong in allowing interest at the rate of six per cent. per annum “from the date when the bond fell due,” evidently thinking that that was at the end of two years. He is also of opinion that the rate of interest stipulated in the bond, *viz.*, twenty-one per cent., is excessive. I differ from him on both points. The bond is in the following terms :—“I, Gopal Rai, son of Bandhan Rai, do declare that, whereas Rs. 484 is due by me to Baldeo Panday on account of previous dealings, and whereas I have borrowed from the said Baldeo Panday a further sum of Rs. 566 for the payment of revenue and to meet other household expenses, the whole sum amounting to Rs. 1,000, I therefore execute this bond in respect of the sum borrowed at present and that formerly due by me, and agree and covenant that, having paid the entire aforesaid sum within two years with interest at Re. 1-12-0 per cent. per mensem, I shall take back the bond from the said mahajan ; that in case of default the creditor shall be at liberty to recover the whole amount, including principal and interest, by instituting a suit, or in any way he pleases, from my person and property, both moveable and immoveable ; that until payment of the whole debt, including principal and interest, I hypothecate my four-anna share in mauza Kharkapur, which I have neither directly or indirectly transferred, nor shall I do so ; that I shall get whatever payments I make endorsed on the bond, and that I shall not plead any payment without getting the same endorsed, and that if I do so or set up any receipt or discharge, the same shall be invalid. Hence this bond.” Now what was the contract here made ? The contract I mean as to interest, for that was the whole question in the case before us. Clearly to my mind the contract so recorded was of this nature : “ You the debtor shall not be troubled about the debt for two years, at the end of which time, if payment is made by you with interest at Re. 1-12-0 per cent. per mensem, there shall be an end to the transaction, and the bond will be returned to you ; but if it be otherwise and you then make default, the creditor shall be at liberty,” *not*, observe, “ shall then be bound, to recover the whole debt including principal and interest, and until payment of such principal and interest the property mentioned in the bond is hypothecated, all the other conditions of [605] the bond meanwhile remaining in force.” Such I take to be the true meaning of the contract in the present case, the rate of interest remaining the same in all the events contemplated. The only peculiarity that might suggest any doubt on this point might be supposed to arise from the fact that, although default appears to have been made at the end of the two years, the plaintiff, Baldeo Panday, did not institute his suit till the 11th May 1877, upwards of three years after default. Now if the interest was excessive, this delay might possibly be justly attributed to the plaintiff’s laches and fairly considered to have the effect of modifying his claim. But I do not think that in the present case such a consideration should prevent us from reading and construing the bond as a contract to be applied according to its terms, and according to these,

as I view them, the creditor was not bound to proceed to recover immediately upon default, but might do so at any time within the limitation period, which, in such a case as the present, I should say would be twelve years from the time when the money became due.

Nor do I think the rate of interest stipulated for excessive. A Calcutta case was referred to * where KEMP, J., in delivering the judgment of the Court, appears to have considered that 18 per cent. per annum or Re. 1-8-0 per month was an excessive rate, but he appears to have formed that opinion from his reading of the judgment of Lord SELBORNE in the case of *Cook v. Fowler* (L. R. 7 H. L., 27) decided by the House of Lords, where the principle laid down is that "the rate of interest to which the parties have agreed during the term of their contract may well be adopted." The rate of interest, however, claimed in that case was £5 per cent. per month, or £60 per annum, and that was justly disallowed, the ordinary rate of interest in England not being more than 5 per cent. But when it is remembered that in India the ordinary rate of interest is one per cent. per month or 12 per cent. per annum, a rate of Re. 1-8-0, or even Re. 1-12-0, ought not in my opinion to be considered excessive, but may fairly and legally be stipulated for by contract. The corresponding rate in England would be not £60 per cent. but [606] seven and a-half or seven and three-quarter per cent. per annum, and would not, I am satisfied, were the facts the same as in the present case, be considered excessive by any English Court. For these reasons the plaintiff is entitled to our judgment reversing the decree of the Judge and restoring that of the Subordinate Judge, with costs in all the Courts.

Spankie, J.—The lower Appellate Court holds that there is no provision in the bond as to the rate of interest to be charged after the date of payment has passed, and therefore interest must be allowed on the principle, not of implied contract, but of damages for breach of contract. Applying the case of *Deen Doyal Lall v. Het Narain Singh** to the record before him, the Judge holds that the interest here demanded after the date of payment is excessive, and allows six per cent. only from the date when the bond fell due. It is contended that the terms of the contract have been misunderstood by the Judge, and that the appellant was, under the provisions of Act XXVIII of 1855, entitled to the interest agreed upon between the parties.

In my opinion the interest referred to in the bond as payable to the plaintiff alike during the term of the contract and until date of payment is Re. 1-12-0 per mensem. The bond recites that the obligor shall pay the amount of it with interest at Re. 1-12-0 per mensem within two years. This is the first condition. The second condition is that in case of default the obligee will be at liberty to recover the amount of debt including the principal and interest, by instituting a suit, or in any other way he pleases, both from the person of the obligor and from his moveable and immoveable property. The third condition is that, until payment of the entire amount, including the principal and interest, the obligor hypothecates his four-anna share in a particular village, and engages not to transfer it directly or indirectly.

Now it appears to me that, with respect to the interest "post diem" there is here clearly a contract to pay the interest agreed between the parties when the principal was lent. Not only was it to [607] be

* *Deen Doyal Lall v. Het Narain Singh*, I. L. R., 2 Cal., 41; S.C. 25 W. R., 189. See also *Joy Ram v. Nobin Chunder Doss*, 25 W. R., 818; *Luchmee Narain v. Het Narain Singh*, 18 W. R., 829; and *Sitanath Bose v. Mathurananth Roy*, 2 B. L. R., Ap. 10.

paid during the continuance of the contract, but by the conditions of the bond the particular four-anna share mentioned therin was charged as security for the payment of the debt, both principal and interest. The principal and interest are the sum for which the bond was executed, and the interest is the 21 per cent. agreed upon. I regard this case as being one free from doubt, and hold that there is no question here of an implied contract to pay the same rate of interest "*post diem*" that was agreed upon "*ante diem*." If I could not construe the contract in this light, I should admit that the Judge was right in applying the precedent cited, that, in the absence of any defined rate of interest to be paid after the period of the bond had expired, the suggestion of an implied contract to pay at the same rate that the obligor was to pay during the term of the bond could not be allowed. The question then would be what would be a reasonable rate of interest to be allowed. In coming to a conclusion on this point, I should be unable to accept the Judge's finding that 6 per cent. was sufficient. The ordinary rule would appear to be that the creditor is entitled to the interest payable during the term of the bond, this amount being regarded as a fair measure of the rate to be allowed as a penalty for breach of contract, provided of course that the original interest claimed is not excessive. In this particular case the bond was executed on account of a former debt, and of a fresh advance of Rs. 566 to pay Government revenue, and it must not be forgotten that the defendant was allowed time. He had only paid Rs. 210 on account of the bond, and it is probable that it was at his own request that the plaintiff allowed the debt to stand over. He himself (defendant) states that he wanted to pay the debt due to plaintiff by borrowing the money from another banker, that he had asked the plaintiff to charge interest at Re. 1-12-0 per mensem up to the date of the term of the bond, and after that date to charge 1 per cent., i.e., 12 per cent. per annum, but the plaintiff did not agree to this nor would he take his money. It is to be observed that defendant's story is not reliable, and is inconsistent with the fact that plaintiff took payment of Rs. 210 on the 20th January 1874. If defendant was in a condition to borrow the money elsewhere why did he not do so? He assigns no reason why the rate demanded is excessive, and his own defence suggests that he was [608] quite aware that the interest to the date of payment was 21 per cent., and he desired to alter the terms after the date expired. The Subordinate Judge allowed 21 per cent. to date of institution of the suit and 6 per cent. afterwards. This was an equitable judgment, and I would affirm it on that ground, did I not also hold that, under the terms of the contract, the plaintiff was entitled to charge 21 per cent. after the date of payment of the bond had expired. I would decree the appeal, and modify the judgment of the lower Appellate Court so as to restore the decree of the Subordinate Judge with costs.

Appeal allowed.

NOTES.

[The Privy Council decision of 19 All. 39 deals with the case of *post diem* interest. See also 25 Cal. 246; 19 Cal. 19; 18 Mad. 257; 18 Mad. 331.

* These were earlier cases, 2 All. 617; 639; 7 All. 333; 11 All. 416.]

[1 All. 608]

APPELLATE CIVIL.

The 19th February, 1878.

PRESENT:

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR. JUSTICE SPANKIE.

Baijnath.....Defendant

versus

Mahabir and another.....Plaintiffs.*

Hindu Law—Inheritance—Succession of daughters—Reversioners.

So long as a daughter not disqualified, or in whom a right of inheritance has once vested, survives, a daughter's son acquires no right by inheritance in his maternal grandfather's estate. *Amritolal Bose v. Rajoneekant Mitter* (L.R., 2 Ind., App. 113; S.C., 15 B. L. R., 10; 23 W.R., 214), followed.

Where, therefore, *R* died leaving issue two daughters, *B* and *P*, and *P* died shortly after *R* leaving sons, and while *B* was alive her sons and the sons of *P* sued as the heirs of *R*, to set aside a mortgage of his real estate made by *B* as the guardian of her minor sons, and by *A*, the father of *P*'s sons, as their father and guardian, such suit was held not to be maintainable.

THIS was a suit for the possession of certain immoveable property, being the estate of one Ram Jiawan, deceased. Ram Jiawan left issue two daughters, Batasi Kuar and Phulra Kuar. Phulra Kuar died shortly after her father leaving issue two sons, Rang Bahadur and Mahabir. Subsequently to her death Batasi Kuar, as the guardian of her minor sons, Kaulesar, Deo Narain and Rup Narain, and Arjan Rai, as the father and guardian of Rang Bahadur and Mahabir, minors, joined in a conditional mortgage of the property to Baijnath. Baijnath obtained possession of the property by foreclosure of this mortgage. The present suit was [609] brought against him by the sons of Batasi Kuar, who was alive, and by the sons of Phulra Kuar, jointly, to set aside the mortgage and recover possession of the property. The plaintiffs claimed as the heirs of Ram Jiawan. The Court of First Instance dismissed the suit in so far as the sons of Batasi Kuar were concerned, on the ground that they had no right in the estate of their maternal grandfather while their mother was alive, but gave the sons of Phulra Kuar a decree in respect of a moiety of the property. On appeal by the defendant, the lower Appellate Court affirmed this decree.

The defendant, on second appeal to the High Court, contended that the whole suit should have been dismissed, inasmuch as under Hindu Law the sons of Phulra Kuar had no right in their maternal grandfather's estate while their mother's sister, Batasi Kuar, was alive.

Munshi Hanuman Prasad and Shah Asad Ali for the Appellant.

Lala Lalta Prasad for the Respondents.

* Second Appeal, No. 1086 of 1877, from a decree of Maulvi Zain-ul-Abdin, Subordinate Judge of Ghazipur, dated the 31st July 1877, affirming a decree of Munshi Kishori Lal, Munsif of Rasra, dated the 3rd May 1877.

The Court delivered the following

Judgment:--The decision of the lower Appellate Court appears to be open to the objection taken by the special appellant. It has been held by the Judicial Committee of the Privy Council in the case of *Amirtolal Bose v. Rajoneekant Mitter* (L. R., 2 Ind., App. 113; S.C., 15 B. L. R. 10; 23 W. R., 214) that a daughter's son is not entitled by Hindu Law to succeed as heir to his maternal grandfather's estate, so long as any daughter not disqualified, or in whom a right of inheritance has once vested, survives. This precedent applies to the present case in which Batasi Kuar, on the death of her sister, became the sole owner of their father's property. Batasi Kuar still survives; therefore neither the Munsif nor the Subordinate Judge should have decreed the claim of the plaintiffs with respect to the share of Phulra Kuar, the second daughter. The Court below should have dismissed the claim of the plaintiffs *in toto*, and should not have decreed it with respect to Phulra Kuar's share. We accordingly decree the appeal and modify the decision of the Court below so as to dismiss this portion of the claim.

Appeal allowed.

NOTES.

[The daughter's son, though he has no right to the immediate possession, can bring, as reversioner, a declaratory suit:—(1880) 8 All., 365.]

[610] APPELLATE CIVIL.

The 22nd February, 1878.

PRESENT :

MR. JUSTICE PEARSON, AND MR. JUSTICE OLDFIELD.

Mul Chand.....Defendant

versus

Balgobind.....Plaintiff.*

Mortgage—Condition against alienation.

J gave *B* a bond for the payment of money in which he hypothecated certain immoveable property as security for such payment, covenanting not to sell or transfer such property until the mortgage-debt had been paid. In breach of this condition he granted *M* a lease of his rights and interest in such property for a term of twelve and-a-half years. *B*, having sued on such bond and obtained a decree charging such property with the satisfaction of the decree, sued *M* and *B* for the cancellation of the lease and a declaration that it would not be binding on the purchaser at a sale in the execution of the decree, alleging that the lease had been granted to defeat the execution of the decree. The High Court refused, in view of its decision in *Chunni v. Thakur Das* (I. L. R., 1 All., 126), to interfere with the decree of the lower Court giving *B* such a declaration.

THIS case being in all respects similar to *Chunni v. Thakur Das* (I. L. R., 1 All., 126), a detailed report of it seems unnecessary.

* Second Appeal, No. 1274 of 1877, from a decree of R. F. Saunders, Esq., Judge of Farukhabad, dated the 8th August 1877, modifying a decree of Pandit Har Sahai, Subordinate Judge of Farukhabad, dated the 18th May 1877.

[1 ALL. 610]

CRIMINAL JURISDICTION.

The 27th February, 1878.

PRESENT:

MR. JUSTICE PEARSON.

In the matter of the petition of Narain Das.

Acquittal of accused without asking assessors their opinion—Error or defect in proceedings—High Court, powers of revision of—act X of 1872 (Criminal Procedure Code), ss. 255, 283, 297, 300.

Held, where without asking the opinion of the Assessors a Court of session acquitted an accused person, after his defence had been heard, that such omission, although a serious irregularity, was not such an error or defect in the proceedings as was, with reference to the provisions of ss. 283^t and 300^t of Act X of 1872, a ground for revisional interference.*

THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872.

[611] One Durga Prasad was tried for certain offences by Mr. C. J. Daniel, Sessions Judge of Mainpuri, with the aid of Assessors, and acquitted, after his defence had been heard, without the opinion of the Assessors being asked. The first ground in the application for revision of this judgment of acquittal took exception to this procedure of the Sessions Judge.

Mr. J. E. Howard for the Petitioner.

The Judgment of the High Court, so far as it related to such ground, was as follows:—

Pearson, J.—The opinion of the Assessors does not appear to have been taken as it is not found on the record. The omission to take it was a serious

*[Sec. 283 :—No finding or sentence passed by a Court of competent jurisdiction shall be reversed or altered on appeal on account of any error or defect,

Finding or sentence when reversible by reason of error or defect in charge or proceedings. or by any misdirection in any charge to a jury, unless such error or defect has occasioned a failure of justice, either by affecting the due conduct of the prosecution, or by prejudicing the prisoner in his defence. No irregularity in the proceedings up to trial is a sufficient ground for reversing any judgment, sentence or order made or passed in a trial properly held.

In case the accused person has been sentenced to a larger amount of punishment than could have been awarded for the offence, which, in the Appellate Court may judgment of the Appellate Court is proved by the evidence, the reduce punishment. Appellate Court may reduce the punishment within the limits prescribed by the Indian Penal Code or any law for the time being in force for such offence.]

Provisions of section 283 to apply. *[Sec. 300 :—The provisions of section, two hundred and eighty-three shall apply to revision orders under this chapter.]

When a judgment of acquittal is recorded under s. 251 of Act X of 1872, it seems that it is not necessary to ask the Assessors their opinion—see *Reg. v. Parvati*, 7 Bom. H. C. R., C. C., 82, where it was so ruled with reference to the corresponding section (872) of the old Code of Criminal Procedure.

irregularity and must be pointed out to the Judge, and he must be cautioned to avoid a similar irregularity in future. At the same time I cannot hold that it affected the conduct of the prosecution or prejudiced the prisoner in his defence, and it is not therefore, with reference to the provisions of ss. 283 and 300 of Act X of 1872, a ground for revisional interference.

NOTES.

[See 24 Mad. 523; 10 All., 414; 4 All., 518.]

[1 All. 611]

APPELLATE CIVIL.

The 27th February, 1878.

PRESENT :

MR. JUSTICE PEARSON, AND MR. JUSTICE TURNER.

Ganga Prasad.....Defendant

versus

Kusyari Din.....Plaintiff.*

Suit for money charged on immoveable property—Mortgage.

The obligor of a bond for the payment of money gave the obligee a moiety of the profits of a certain mauza up to the end of the current settlement, and charged the other moiety of such profits with the payment of such money. It was also stipulated in such bond that the obligee should take the management of such mauza, rendering accounts to the obligor, and that, if the obligor failed to pay such money when due, the obligee should remain in possession of the entire mauza until payment of all that was due. The original obligor having died, his heir gave the obligee a second bond, in which he admitted the creation of the original charge and a certain further debt. A portion of such further debt he undertook to pay on a certain date, and he agreed that the balance due should be realised by the obligee from a moiety of the profits of the mauza, according to the terms of the first bond, and that the mauza should remain in the obligee's possession until the amounts due under both bonds were realised by him, and that he, the obligor, should have no power to sell, mortgage, or alienate the mauza. *Held*, in a suit by the obligee on the bonds, that the bonds created a mortgage [612] only of the profits of the mauza and not of the mauza itself, and accordingly that they did not entitle the obligee to a decree for the sale of the mauza.

THIS was a suit to bring to sale a certain mauza for the satisfaction of the debts due under bonds dated the 17th April 1860, and the 6th February 1873, respectively. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the defendant appealed against the decree of the Court of First Instance, on the ground that the bonds in suit created no charge upon the mauza but only on its profits.

Munshi Hanuman Prasad and Pandit Bishambhar Nath for the Appellant.

* Regular Appeal No. 112 of 1877, from a decree of Maulvi Ali Bakhsh Khan, Subordinate Judge of Banda, dated the 28th September 1877.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*) and Babu *Jogindro Nath Chaudhri* for the Respondent.

The Judgment of the Court was delivered by

Turner, J.—In our judgment, on the proper construction of the two deeds on which the respondent relies, by neither of them was such a security created as would entitle the mortgagee to call for the sale of the mauza.

By the first deed, executed on the 17th April 1860, in consideration of a loan of Rs. 710, the mortgagor gave the mortgagee one half of the profits of the mauza up to the end of the then current settlement, and he charged the remaining one half share of the profits with the payment of the mortgage-debt and interest. It was also stipulated that the mortgagee should take the management of the mauza, rendering accounts to the mortgagor, and that, if the mortgagor should fail to pay the debt therein mentioned, or should take another loan and fail to pay it within the term therein mentioned, the mortgagee should remain in possession of the entire mauza until payment of all that might be due. This deed clearly created no hypothecation of the mauza itself. It assigned one half of the profits to the mortgagee for the period of the then current settlement, and charge the residue of the profits with the mortgage.

The original mortgagor having died, his heir executed a second deed on the 6th February 1873, in which he admitted the creation of the original charge and the existence of a further debt of Rs. 1,000. The further debt of Rs. 1,000 he undertook to discharge [613] by payment of Rs. 500 in Chait, 1920 Sambat, and he agreed that the balance should be realised by the mortgagee from half the profits of the mauza in his possession according to the terms of the bond for Rs. 710, dated the 17th April 1860, and that, until the realisation of the amounts entered in both bonds as well as of any amount borrowed in future, the mauza should continue in the possession of the mortgagee, and that the mortgagor should have no power to sell, mortgage, nor alienate it. Had this last condition stood alone, it may be conceded that it would have been sufficient to constitute a simple mortgage of the estate,* and the respondent would have been entitled to an order for sale, but the clause must be read with what preceded it, and so read it is to our minds clear that the parties intended to mortgage the profits and not the mauza itself nor any share in it. This construction is favoured by the direction which immediately follows the agreement not to alienate, and which is to the effect that an arrear of revenue which had been defrayed by the mortgagee should be realised from the profits. We must therefore hold that the respondent is not entitled to the relief he seeks in this suit, and reversing so much of the decree of the Court below as decreed the claim in part we must dismiss the suit with costs.

Appeal allowed.

* See *Raj Kumar Ramgopal Narayan Singh v. Ram Dutt Chowdhry*, 5 B. L. R., F. B. 264; S. C., 18 W. R., F. B., 82, where it was held that a bond for the payment of money containing an agreement by the obligor not to alienate certain lands until such money was paid, operated as a mortgage of such lands. See also *Martin v. Parsram*, H.C.R., N.-W., P., 1867, p. 124.

[1 All. 613]

APPELLATE CIVIL.

The 4th March, 1878.

PRESENT :

MR. JUSTICE SPANKIE AND MR. JUSTICE OLDFIELD.

Sundar and others.....Plaintiffs

versus

Khuman Singh.....Defendant.*

Record-of-rights—Jurisdiction of Civil and Revenue Court—Act XIX of 1873 (North-Western Provinces Land Revenue Act), ss. 62, 91, 94, 241.

The Civil Courts are not competent to try suits to alter or amend a record-of-rights, or to give directions in respect of the same, but they are not debarred from entertaining and determining questions of right merely because such questions may have been the subject of entries in the record-of-rights, and because such determination may show that such entries are wrong and need correction. Consequently, a claim in the Civil Court for a [614] declaration of the right to make certain collections of rent and to defray therewith certain village-expenses, though such right had been the subject of an entry in the record-of-rights adverse to the person claiming such right, was held to be maintainable.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the plaintiffs in the suit appealed against the decree of the lower Appellate Court.

Munshi *Hanuman Prasad* and Lala *Har Kishen Das* for the Appellants.

The Junior Government Pleader (*Babu Dwarka Nath Banarji*) and Pandit *Ajudhia Nath* for the Respondent.

The Judgment of the Court was delivered by

Oldfield, J.—The plaintiffs brought this suit originally for the cancellation of the orders of the Deputy Collector and Settlement Officer relating to the formation of the record-of-rights, over which the Civil Court has no jurisdiction, at the same time asking that they might disburse the village-expenses as before. The Court of First Instance rejected the plaint, and the lower Appellate Court reversed this order and remanded the case for trial, with an intimation that the plaintiff was at liberty to amend the plaint, and in special appeal this Court did not interfere with this order. The plaint was not amended till the 24th July, and on the same day the Court of First Instance decided the case, after directing that the amended plaint should be filed with the record, and after the defendant had filed an answer to the amended plaint, and after evidence had been taken, which, however, was taken before amendment of the plaint. The Court of First Instance

* Second Appeal, No. 1875 of 1877, from a decree of R. F. Saunders, Esq., Judge of Farukhabad, dated the 7th September 1877, affirming a decree of Maulvi Muhammad Abdul Basit, Munsif of Chibraman, dated the 24th July 1877.

held that, notwithstanding the amendment of plaint, the suit was not cognizable by the Civil Court. The plaint as amended is for establishment of the plaintiffs' right as hitherto to make collections of rent from certain cultivators, and to defray the village-expenses themselves on their share of the estate ; this right having, it appears, been interfered with by the Settlement Officer's order, by which the defendant's right was recognised to collect these rents and to take them for defraying village-expenses. The lower Appellate Court also held the suit on the amended plaint not to be cognizable. Both Courts seem to consider that in substance there is no difference [615] in the two plaints in the relief sought, that the object of the amended plaint is substantially to cancel an order of the Settlement Officer affecting the record-of-rights, although not stated in so many words, and that such a suit cannot be entertained under s. 241 of Act XIX of 1873 ; and the Judge seems further to consider that, inasmuch as the plaintiffs appealed from the Deputy Collector's orders to the Settlement Officer and failed, they are debarred from bringing this suit.

The view which the lower Courts have taken is erroneous. In the order of this Court in special appeal the Court pointed out the distinction which exists between that portion of the plaintiffs' claim in which they ask for the Court's interference with the formation of the record-of-rights, and that portion in which they ask to have declared their right to make certain collections of rent and defray village-expenses themselves.

The law enacts (s. 241) that no Civil Court shall exercise jurisdiction in "the matter" of the "formation of the record-of-rights"; but the matter of the formation of a record is clearly not the same thing as the question of the rights which its entries record. The Civil Court may not alter or amend the record or give directions in respect of it, because the formation and maintenance of the record and correction of errors in it has been made by ss. 62 and 94 of Act XIX of 1873, a matter peculiarly within the province of the Revenue Court. That was the object with which that part of s. 241 above cited was enacted, but it was not intended to debar Civil Courts from entertaining and deciding questions of rights between parties merely because those questions may have been made the subject of entries in the record, and because the decision of the Civil Court may show that they are wrong and need correction. Sections 62 and following sections detail what the contents of the record-of-rights shall be, and the principle on which it is to be prepared, and the powers which the Settlement Officer shall exercise in its preparation ; and s. 91 goes no further than to declare that "all entries in the record so made and attested shall be presumed to be true until the contrary is proved." To so much weight the entries are entitled by a Civil Court, and s. 241 has been misinterpreted by the lower Appellate Court, and was not intended to bar the jurisdiction of the Civil Courts in respect of the determination [616] of questions of right merely by reason of the record-of-rights treating of them. How far the question raised in this suit has been determined in the Settlement Department, and how far any such determination may be binding, we are not in a position to say, as the case has not been tried at all by the Court of First Instance. We reverse the decrees of both Courts and remand the suit to the Court of First Instance for retrial. Costs to abide the result.

*

Cause remanded.

NOTES.

[See (1887) 9 All. 429.]

[1 All. 616]

APPELLATE CIVIL.

The 4th March, 1878.

PRESENT :

MR. JUSTICE SPANKIE AND MR. JUSTICE OLDFIELD.

Zaib-un-nissa.....Plaintiff

versus

Jairam Gir.....Defendant.*

*Attachment of property in execution of decree—Private alienation after such**Attachment—Act VIII of 1859 (Civil Procedure Code), s. 240.*

Where certain immoveable property having been attached, the execution-case was subsequently struck off the file, and the judgment-debtor applied again for attachment of the same property, *held*, looking to the particular circumstances of the case, that a private alienation of the property after the date of such application but before attachment was not void under the provisions of s. 240 of Act VIII of 1859. The principle of the High Court's decision in *Ahmud Hossein Khan v. Mahomed Azeem Khan* † followed.

[617] THIS was a suit to establish the plaintiff's right to certain immoveable property. This property was attached on the 2nd May 1871, in the execution of a money-decree held by the defendant in this suit against Ghaus Ali and certain other persons. On the 22nd July 1871, the execution-case was struck off the file by the Court executing the decree. On the 28th August 1873, the defendant again applied for the execution of the decree by the attachment and sale of the property. On the 12th September 1873, the Court directed notice to issue to the judgment-debtors, under the provisions of s. 216 of Act VIII of

* Second Appeal, No. 1458 of 1877, from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 2nd August 1877, affirming a decree of Pandit Har Sahai, Subordinate Judge of Azamgarh, dated the 12th May 1876.

† H. C. R., N.-W. P., 1869, p. 51. See also *Jugunath v. Ghasee Ram*, H. C. R., N.-W. P., 1869, p. 32. In this case certain shops had been attached in the execution of a decree and directed to be sold. On the decree-holder applying that, as the judgment-debtor wished to mortgage the shops, they might be exonerated from liability for his decree, the sale was postponed by the Court *sine die*. The shops were subsequently mortgaged. It was held that the attachment must be considered to have been withdrawn, and the mortgage was therefore not invalid.

Striking an execution-proceeding off the file is an act which admits of different interpretations according to the circumstances under which it is done—*Puddomonee Dossee v. Roy Muthooranath Chordhry*, 12 B. L. R., P. C., 411. In that case the Privy Council were of opinion that, where a very long time had elapsed between an execution and the date at which it was struck off, it should be presumed that the execution was abandoned and ceased to be operative, unless the circumstances are otherwise explained. In *Da Costa v. Kalee Pershad Singh*, 12 W. R., 260, where, after attachment had issued, the decree-holder asked the Court to stay further proceedings for six weeks, praying at the same time that the attachment might be continued, and the Court struck the case off the file for its own convenience, and the decree-holder allowed a year to elapse before taking further proceedings, LOCH, J., *held*, JACKSON, J., *dissenting*, that there was no abandonment of the attachment. It cannot be presumed that an attachment has been abandoned merely because the execution-case has been struck off the file, or because subsequent applications for attachment have not been made—*Jhatu Sahu v. Ramcharan Lal*, 3 B. L. R., Ap. 68; S.C. 11, W. R., 517; *Mahatab Chand v. Surnomoyee Dossee*, 12 B.L.R., 414, note, S.C. 15 W. R., 222. See also *Gholam Hambeya v. Shama Sundari Kuari*, 3 B. L. R., Ap. 184; S. C. 12 W. R., 142.

1859. On the 17th September 1873, the judgment-debtors sold the property to the plaintiff in this suit. On the 28th November 1873, the Court ordered the property to be attached. The plaintiff preferred a claim to the property in virtue of her purchase, but her claim was disallowed on the 23rd January 1875, and she accordingly brought the present suit to establish her right to the property. The Court of First Instance dismissed the suit, holding, with reference to the provisions of s. 240 of Act VIII of 1859, that the sale to the plaintiff was void, the same having been made while the property was under attachment. On appeal by the plaintiff the lower Appellate Court also held that the plaintiff had purchased the property while under attachment, and that the sale was consequently void, and further that, as the sale was made with notice of the attachment and in order to defeat the execution of the defendant's decree, it was made in bad faith.

The plaintiff appealed to the High Court, contending that, as the attachment on the property had been virtually removed in July 1871, by the order striking the execution-case off the file, the property was not under attachment when it was sold, and the sale was consequently not void; and that, as consideration for the sale had passed, the lower Appellate Court had erred in holding that the sale was made in bad faith.

Pandit Ajudhia Nath and Shah Asad Ali for the Appellant.

Lala Lalta Prasad for the Respondent.

The Judgment of the Court, so far as it related to this contention, was as follows :—

[618] Oldfield, J.—Nor are we of opinion that plaintiff's purchase is void by reason of there being subsisting an attachment of the property at the time of his purchase. There had been an attachment in May 1871, but it appears to us to have been removed when the proceedings in execution came to an end in the following July, for we find the defendant in 1873 applying again to have the property attached, which he would not have done if it was then under attachment; and in the reports made on his application no mention is made that there was an attachment subsisting, but on the contrary we find that the Court, on the 28th November 1873, issued orders for attachment. We must give effect to what appears to have been the object and intention of the orders in the former proceedings, and this is the principle laid down in the Full Bench ruling of this Court—*Ahmud Hossein Khan v. Mahomed Azeem Khan* (H. C. R., N.-W. P., 1869, p. 51).

The Judge's finding that the plaintiff purchased in bad faith, which is based on the error that he knew at the time that there was a subsisting attachment, necessarily falls to the ground, for there is no reason to suppose that it was not a *bona fide* purchase for valuable consideration. We decree the appeal and reverse the decrees of the lower Courts, and decree the claim with costs in all Courts.

Appeal allowed.

NOTES.

【Compare with this, (1881) 8 C. I. R. 157 ; (1890) 18 Cal., 188 ; (1883) 6 All., 93 ; (1899) 23 Mad., 478 ; 5 A.W.N. 57 ; (1905) 8 O.C. 152.】

[1 All. 618]

APPELLATE CIVIL.

The 5th March, 1878.

PRESENT :

MR. JUSTICE TURNER, AND MR. JUSTICE SPANKIE.

Lakhmi Chand.....Plaintiff

versus

Tori Lal and others.....Defendants.*

Agreement—Consideration—Act IX of 1872 (Contract Act), ss. 23, 25.

By a written instrument, duly registered, *T* agreed, in consideration of the recognition by his two brothers of his rights in the joint and undivided property of the three brothers, not to sell, transfer, or mortgage his share except to them, and should he desire to dispose of it, to dispose of it to them for a certain sum. In breach of this agreement he gave a usufructuary mortgage of his share to *L. Held*, in a suit by *L* to enforce the mortgage, that the agreement was valid, and that the mortgage was bad against *T's* brothers.

THIS was a suit to enforce a usufructuary mortgage. An eight-anna share in a certain village and certain land was the joint and [619] undivided property in equal shares of three brothers, Tori Lal, Sham Lal, and Baldeo Prasad. Sham Lal's name was, however, entered in the revenue register as the proprietor of two-thirds of the property, and Baldeo Prasad's name as the proprietor of the remaining one-third, Tori Lal's name not being entered as a proprietor. On the 18th September 1874, Tori Lal, by an instrument in writing, duly registered, entered into an agreement to the following effect : " Whereas Sham Lal and Baldeo Prasad, my brothers, have agreed that my name shall be entered in respect of one-third of the ancestral property, and that they will procure the entry of my name in respect of such share, and that I am to remain in possession of such share while I live, paying the Government revenue and enjoying the income and profits, subject, however, to this condition, viz., that I am not to sell, mortgage, or transfer such share except to them, I therefore agree to remain in possession of such share while I live, paying the Government revenue and enjoying the income and profits, and not to sell, make a gift of, transfer, or mortgage such share. Should I desire to dispose of the share, I will dispose of it to Sham Lal and Baldeo Prasad, my brothers, and will only take Rs. 800 from them." On the 18th March 1875, Tori Lal's name was recorded as proprietor in respect of one-third of the property. On the 13th September 1876, he gave one Lakhmi Chand a usufructuary mortgage of his share for eighteen years. On the 16th June 1877, Lakhmi Chand brought the present suit against Tori Lal to enforce this mortgage. Sham Lal and Baldeo Prasad, having been made parties to the suit, set up the agreement of the 18th September 1874 as a defence to it. The Court of First Instance held that the agreement was valid, not being opposed to public policy or immoral, and having been made out of natural love and affection, to save Tori Lal's property from the effects of his extravagance, and dismissed the suit. On appeal by the

* Special Appeal, No. 1248 of 1877, from a decree of E. B. Thornbill, Esq., Judge of Banda, dated the 29th August 1877, affirming a decree of Pandit Ram Narain, Munsif of Hamirpur, dated the 19th July 1877.

plaintiff the lower Appellate Court affirmed the decree of the first Court, observing as follows : "There is nothing immoral or contrary to public policy in the agreement which would render it void under s. 28 of the Contract Act : there appears to have been sufficient consideration for the agreement not to alienate or hypothecate, in assisting in getting the name of Tori Lal entered as proprietor of one-third : the main object of Sham Lal and Baldeo Prasad was to [620] keep out interlopers, and considering that the parties are own brothers there is nothing abnormal in such an agreement."

The plaintiff appealed to the High Court, contending that the agreement was not binding, there being no consideration for it, and that it had been made in fraud of the plaintiff.

Munshi Hanuman Prasad and Ram Prasad for the Appellant.

Pandit Bishambhar Nath and Babu Oprakash Chandar for the Respondents.

The Judgment of the Court was delivered by

Turner, J.—In our judgment the agreement is binding. It is registered, and the settlor thereby agrees that, in consideration of the recognition by the brothers of his rights in the property to which the deed relates, he will not sell, transfer, or hypothecate his share, and that should he desire to dispose of it he would convey it to them for Rs. 800. There is no reason why such an agreement should not be enforced. If it was made out of natural affection it has been expressed in writing and duly registered. If the consideration was, as it purports to have been, the recognition of the settlor's right to share, there was a consideration. There is nothing to show that the agreement was made in fraud of the appellant. The appeal fails and is dismissed with costs.

Appeal dismissed.

[1 All. 620]

APPELLATE CIVIL.

The 7th March, 1878.

PRESENT :

MR. JUSTICE PEARSON AND MR. JUSTICE SPANKIE.

Kallian Das and others.....Plaintiffs

versus

Nawalsingh and others.....Defendants.*

Return of plaint—Appeal—Act VIII of 1859 (Civil Procedure Code)—Act X of 1877 (Civil Procedure Code), s. 584—Suit for redemption of usufructuary mortgage—Jurisdiction.

A suit to redeem a usufructuary mortgage of certain lands was instituted in the Munsif's Court. After the suit had been admitted and the parties [621] called on to produce evidence, the Munsif ordered the plaint in the suit to be returned to the plaintiff for presentation in the proper Court, on the ground that the suit should have been instituted in the Court of the Subordinate Judge, the value of the property in suit being beyond

* Second Appeal, No. 1424 of 1877, from a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 18th September 1877, affirming a decree of Munshi Ganga Saran, Munsif of Khair, dated the 26th June 1877.

the jurisdiction of a Munsif. Held that, under Act VIII of 1859, the Munsif's order was appealable to the lower Appellate Court, and, under Act X of 1877, the lower Appellate Court's order to the High Court.

Where the question in dispute in such a suit is not only whether the property has been redeemed out of the usufruct, but whether the property and the right to redeem belongs to the plaintiff, and the value of the property exceeds Rs. 1,000, such suit is not cognizable by a Munsif.

THIS was a suit for "complete" possession of certain land by redemption of a usufructuary mortgage and ejectment of the defendants, valued at Rs. 150, the principal money secured by the mortgage. The suit was instituted in the Munsif's Court on the 17th April 1877. On its institution the Munsif made an order on the plaint fixing the 8th May 1877 for the hearing of the suit, and directing that the defendants should be summoned to appear on that day in person or by pleader, and that the pleaders for the plaintiffs should be ready to produce their evidence. The defendants appearing denied the mortgage and set up a proprietary title to the land. On the 26th June 1877, the Munsif ordered the plaint in the suit to be returned to the plaintiffs for presentation in the proper Court, holding that having looked to the nature of the defence, the suit must be regarded as one to recover possession of immoveable property, and that, therefore, as the value of the land exceeded Rs. 1,000, the suit was not cognizable by a Munsif. On appeal by the plaintiffs, the Subordinate Judge affirmed the decision of the Munsif.

The plaintiffs appealed to the High Court, contending that the suit was one to redeem mortgaged property, to be valued according to the principal money secured by the mortgage, and not one for the possession of land, to be valued under cl. v. (b), s. 7 of Act VII of 1870, and the mere assertion by the defendants of an adverse title could not alter the nature of the suit; and that the Subordinate Judge had no jurisdiction to hear an appeal from the Munsif's order, but should have directed the plaintiffs to institute the suit in his own Court.

Mir Akbar Husain for the Appellants.

Munshi Hanuman Prasad for the Respondents.

[622] The Judgment of the Court was delivered by

Pearson, J.—A doubt was expressed at the hearing as to the admissibility of this appeal. We do not share that doubt. A case of exactly the same nature was entertained and disposed of on the 18th January last.* The Munsif's order for the return of the plaint was passed after the suit had been admitted on the file and parties had been called on to produce evidence. His order finally disposed of the suit, and was the legitimate subject of a regular appeal under Act VIII of 1859. The present appeal from the appellate decree of the lower Appellate Court has presumably been brought and admitted under s. 584 of Act X of 1877.

The lower Appellate Court's decision is, in our opinion, right. The question is not one of institution-fee but of jurisdiction: and it appears that the subject-matter of dispute in this case is not only whether the property has been redeemed by payment of the debt out of the usufruct, but whether the property and the right to redeem belongs to the plaintiffs. As the value of the

* In the case referred to the question of the admissibility of a first or second appeal was not raised. TURNER and SPANKIE, JJ., held in it that, as the mortgaged property was the matter in dispute and the value of the ownership was in excess of the pecuniary limits of the Munsif's jurisdiction, the Munsif could not entertain the suit.

property is found to exceed Rs. 1,000, it has been rightly held that the suit was not cognizable by the Munsif. The plaint was returned to the plaintiffs for presentation in the proper Court. Instead of presenting it there, they elected to appeal from the Munsif's order and the lower Appellate Court has properly disposed of their appeal. We dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[See 11 Bom., 591.]

[1 All. 622]

APPELLATE CIVIL.

The 8th March, 1878.

PRESENT:

MR. JUSTICE PEARSON, AND MR. JUSTICE TURNER.

Shib Lal and others.....Plaintiffs

versus

Hira Lal and another.....Defendants.*

Cancellation of document—Suit for a declaration that a document is not genuine—Reasonable apprehension of injury.

Where a void or voidable document cannot legally be used for the purpose which is apprehended, there is no such reasonable apprehension that [623] such document, if left outstanding, will cause injury as will entitle the person claiming the cancellation of such document to relief.

THIS was a suit for a declaration that a certain receipt was not a genuine document. Nek Ram and Naubat Singh gave Dharam Jit, the father of Hira Lal and Bhaggi Lal, on the 6th November 1856, a bond for the payment of Rs. 5,000, in which they mortgaged certain immoveable property as security for such payment. Hira Lal and Bhaggi Lal brought a suit on this bond to recover the amount due thereunder from the obligors personally, which suit was dismissed as barred by limitation. On the 22nd September 1875, the purchasers of Nek Ram's interests in the property and Naubat Singh brought the present suit for a declaration that an instrument, dated the 18th June 1875, purporting to be an acknowledgment by Hira Lal of the receipt from Nek Ram and Naubat Singh of Rs. 1,925 and Rs. 350, in part payment of the debt due under the bond, was not a genuine instrument. The plaintiffs alleged that no such payments were made by Nek Ram and Naubat Singh, and that the receipt had been fabricated with the object of reviving the right of suit on the

* Second Appeal, No. 12 of 1878, from a decree of C.J. Daniell, Esq., Judge of Mainpuri, dated the 19th September 1877, reversing a decree of Maulvi Muhammad Hamid Hasan Khan, Subordinate Judge of Mainpuri, dated the 20th July 1876.

[1 ALL. 625]

FULL BENCH.

The 22nd August, 1877.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, MR. JUSTICE PEARSON,
 MR. JUSTICE TURNER, MR. JUSTICE SPANKIE, AND
 MR. JUSTICE OLDFIELD.

Empress of India
versus
 Kashmiri Lal.

Act X of 1872 (Criminal Procedure Code), ss. 435, 436, 467, 468, 469, 471, 472, 473—False evidence—Offence against public justice—Offence in contempt of Court—Act XLV of 1860 (Indian Penal Code), s. 193—Prosecution—Procedure.

Held (STUART, C. J., dissenting), that an offence under s. 193 of the Indian Penal Code, being an offence in contempt of Court within the meaning of s. 473 of Act X of 1872* cannot, under that section, be tried by the Magistrate before whom such offence is committed. *Queen v. Kultaram Singh* (I. L. R. 1 All., 129) and *Queen v. Jagat Mal* (I. L. R., 1 All., 162) overruled.

[626] Per STUART, C.J.—A Magistrate before whom such an offence is committed, if competent to try it himself, is not precluded from so doing by the provisions of s. 471 of Act X of 1872 †

THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872, in which the Court (PEARSON, J.) referred to the Full Bench the questions (i) whether an offence under s. 193 of Act XLV of 1860 is a contempt of Court within the scope of s. 473 of Act X of 1872, and (ii) whether a Magistrate before whom such an offence is committed, being competent to try it himself, is precluded from doing so himself by s. 471 of Act X of 1872, and is bound to send the case for trial or commitment to another Magistrate.

Mr. L. Dillon for the Petitioner.

The Junior Government Pleader (Babu Dwarka Nath Banarji) for the Crown.

The following Judgments were delivered by the Full Bench :—

Stuart, C. J.—I have given the questions submitted by this reference and the authorities bearing upon them my anxious consideration, and I cannot hold that the offence defined by s. 193 of the Indian Penal Code is within the meaning and scope of s. 473 of the Criminal Procedure Code. I regret to say

* See also *Reg. v. Navranbeg Dulabeg*, 10 Bom. H. C. Rep., 78; *Reg. v. Gaji Kom Ranu*, I. L. R., 1 Bom., 311; 7 Mad. H. C. Rep., Rulings xvii and xviii. On the other hand, see the case of *Sufatullah*, 22 W. R. Cr., 49.

† See also *Queen v. Jagat Mal*, I. L. R., 1 All., 162, and *Queen v. Gur Bakhsh*, I. L. R., 1 All., 193. On the other hand see *Queen v. Kultaram Singh*, I. L. R., 1 All., 129, and the case of *Sufatullah*, 22 W. R. Cr., 49.

that I fail to appreciate the Madras and Bombay rulings which were referred to at the hearing. These rulings, as well as the argument that was maintained before us on behalf of the appellant, express, I must be allowed to say, somewhat loosely and inartificially the general view of the bearing of the Penal and Procedure Codes in regard to offences of this nature. But we must not generalise in such a matter. There can be no doubt that in a certain sense there is involved in the crime of perjury an offence both against the authority of Courts and of public justice; but a more precise question is before us in this reference, and, arising as it does in a criminal case, it should be answered with as much precision and exactness as possible. The question then is, not whether the offence here is as one against the authority of a Court or against public justice, or of both kinds, but whether the precise and particular offence defined by s. 193 of the Penal Code is a contempt within [627] the meaning and scope of s. 473 of the Procedure Code. I am of opinion that it is not. With the exception of the law provided by ch. x of the Penal Code and ch. xxxii of the Procedure Code, no legal definition has been given, so far as I am aware, by any authority recognized by the law of India, Civil or Criminal, of the expression "Contempt of Court," and we can only arrive at a conclusion on such a question as this by comparing the terms of s. 193 of the Penal Code with the provisions of ch. x of that Code and ch. xxxii of the Procedure Code to which I have referred, and by considering whether s. 193 fairly comes within the scope of these provisions. Now the offence defined by s. 193 is distinct and precise in itself, and it forms part of ch. xi of the Penal Code, which deals with the subject of false evidence and of offences against public justice. On the other hand, the immediately preceding ch. x treats of the contempts of the lawful authority of public servants, and within that chapter the excepted matters in s. 473 are to be found, and it appears to me that by no straining of language or meaning could the offence defined by s. 193 of the Penal Code be brought within the sanction of ch. x generally, or specially within the offences intended by the exceptions mentioned in s. 473 of the Procedure Code.

The other question in this reference is, whether a Magistrate before whom the offence under s. 193 is committed, being competent to try it himself, is precluded from doing so by s. 471 of the Procedure Code, and is bound to send the case for trial or commitment to another Magistrate. I have again carefully considered this question, and feel obliged to state that I deliberately and advisedly adhere to my judgment in the case of *Queen v. Jagat Mal* (I. L. R., 1 All., 169), by which I ruled that, as the offence under s. 193 of the Penal Code was one of those included in the category contained in s. 471 of the Procedure Code, the Magistrate there, who was of the first class, had therefore power to try and commit, and could commit either to himself or to the Sessions Court, or send the case for inquiry and commitment to any other Magistrate with the like powers, but that the first mentioned Magistrate was not precluded by s. 473 from trying the offence himself, as he is not, I consider, in the present case.

[628] The offence under s. 193 of the Penal Code being included in the procedure provided by s. 471 of the Procedure Code is not merely a contempt in any general sense, but a distinct and substantive offence in itself, which, in my judgment, a Magistrate may commit to and try by himself.

Pearson, J.—Section 473 of Act X of 1872 recognises the offences to which s. 472 refers as offences committed in contempt of the authority of a Court, and those are the same as are indicated in s. 471 as being mentioned

in ss. 467, 468 and 469. Section 467 speaks of the offences described in ch. x of the Indian Penal Code not falling within ss. 435 or 436 of the Criminal Procedure Code. Section 468 speaks of the offences against public justice described in ss. 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 and 228 of the Indian Penal Code, when such offence is committed before or against a Civil or Criminal Court. Section 469 speaks of offences relating to documents described in ss. 463, 471, 475, 476, of the Indian Penal Code when the document has been given in evidence in any Civil or Criminal Court. It appears to me to follow as a necessary conclusion that the offences above mentioned are all contempts of the authority of a Court within the scope of s. 473, and cannot be tried by the Court before or against which they may have been committed.

Under this view the answer to the reference must be that the Court in which the offence described in s. 193 of the Indian Penal Code has been committed cannot try the offender. It is unnecessary to determine whether he is precluded from doing so by s. 471 of the Indian Penal Code. Otherwise I should have been disposed to adhere to my ruling in the case of *Queen v. Gur Bakhsh* (I. L. R., 1 All., 193).

Turner, J.—No good reason is assigned for limiting the term “offence committed in contempt of its own authority” in s. 473 of the Criminal Procedure Code to offences defined in and punishable under ch. x of the Indian Penal Code, and therein described as offences against the lawful authority of public servants. It must, therefore, be taken to embrace all offences which are recognised as contempts of the authority of a Court of Justice. The offence of giving false evidence is such an offence, and reading s. 473 of the Criminal Procedure Code with the sections that immediately precede it, [629] it does not appear to admit of doubt that the Legislature intended that the offence of giving false evidence should be so regarded.

In ss. 435 and 436 the Code prescribes the procedure to be adopted for the punishment of contempts of Court when immediate action is called for by the nature of the offence. In ss. 464-473 it deals with offences of the same character which generally admit of more deliberate action. To prevent the oppressiveness of frivolous proceedings by hostile parties, it requires in ss. 467, 468, and 479 that a complaint of any offence specified in those sections shall not be entertained without sanction of the nature described in s. 470, and among the offences specified in s. 468 is the offence described in s. 193 of the Indian Penal Code. In s. 471 it declares the procedure to be followed when the Court before which any offence specified in ss. 467, 468 and 469 is committed itself takes action and declares the Court competent to commit or send the case for enquiry to any Magistrate having power to try or commit. In s. 472 it empowers a Court of Session to charge a person for any “such” offence, if the offence be triable by the Court of Session exclusively, and to commit or hold to bail and try such person on its own charge; and lastly in s. 473 it declares in the most explicit language that, except as provided in ss. 435, 436, and 472, no Court shall try any person for an offence committed in contempt of its own authority. It seems clearly to have been intended, so far as is consistent with public convenience, to secure to a person accused of any such offence a trial free from the prejudice which the Judge before whom the offence is alleged to have been committed would be likely to entertain. For these reasons I am of opinion that the Magistrate was incompetent to try the accused.

Spankie, J.—I am prepared to accept the rulings of the Madras and Bombay High Courts on the point referred to us, cited during the argument. An

offence under s. 193 committed before a Court appears to be not only an offence against public justice, but also a contempt of the Court's authority. Section 435 of the Criminal Procedure Code too does not limit the offences to which it refers to those only to be found in ch. x of the Penal Code, for an offence under s. 228, ch. xi, is imported into the section. Reading ss. 471, 472 and 473 of the Criminal Procedure Code together, I conclude that a Magistrate cannot try a charge under s. 193 of the [630] Penal Code if the false evidence has been given in his own Court, and that no Court other than the Court of Sessions can try any person for an offence committed in contempt of its own authority.

Oldfield, J.—I adhere to the opinion which I expressed in the case of *Queen v. Kultaran Singh* (I. L. R., 1 All., 129) that the Court before which an offence under s. 193 of the Indian Penal Code is alleged to have been committed cannot try the case. I think the terms of s. 471 of the Criminal Procedure Code are sufficiently clear on this point. I so far modify the view I then took as to hold that an offence under s. 193 of the Penal Code may be considered an offence committed in contempt of the authority of the Court, and therefore s. 473 of the Criminal Procedure Code will also operate to prevent the Court trying any person for such an offence committed before it.

NOTES.

[See 3 All., 322 ; 14 All., 354.]

[1 All. 630]

CRIMINAL JURISDICTION.

The 25th February, 1878.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE.

Empress of India

versus

Seymour.

Act X of 1871 (Excise Act), ch. vi, and ss. 57, 62—Illicit sale of liquor—License.

On the 30th October 1877, N was granted a license for the sale of spirituous and fermented liquors by retail terminating on the 31st December 1877. On the 11th January 1878, such license was renewed by the Collector for a period terminating on the 31st March 1878. On the 14th January 1878, N's servant was convicted, under s. 62 of Act X of 1871, of the illicit sale of liquors between the 1st January 1878, and the 10th January 1878, both days inclusive. Held that the renewal of N's license was a condonation of the offence and the conviction was bad. •

Sembler that, inasmuch as *N* had given no notice of his intention not to renew the license, nor had the Collector recalled it, the license remained in force, and the conviction was consequently bad, under s. 32 * of Act X of 1871.

THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872. The petitioner had been convicted, under s. 62 † of Act X of 1871, of the offence of selling spirituous and fermented liquors by retail without a license by Mr. J. B. Thomson, Magistrate of the first class. The facts of the case are sufficiently stated for the purpose of this report in the judgment of the High Court.

Mr. Howard for the Petitioner.

[631] The Junior Government Pleader (Babu Dwarika Nath Banarji) for the Crown.

The following Judgment was delivered by the Court :—

Stuart, C.J.—This is an application for revision of the conviction, under s. 62 of the Excise Act X of 1871, of Charles Seymour, an assistant employed in Newton's Hotel at Allahabad, and of the sentence passed on him to pay a fine of Rs. 100, or one month's imprisonment in the Civil Jail, although Mrs. Newton is the real party concerned.

I must, in the first place, remark that, even if the conviction could be supported, the prosecution of the defendant was in my opinion an extremely harsh and uncalled for proceeding, and I regret to say that the Assistant Magistrate appears to have acted with reprehensible precipitancy, and without considerate and thoughtful attention to the facts of the case, and the provisions of the Excise Law, as embodied in Act X of 1871, and I have further to remark here that the sentence passed was out of all proportion to the very venial character of the offence, if offence there was, a nominal fine of say one rupee being quite sufficient.

But in my judgment the legality of the conviction is, to say the least, so doubtful that it ought not to be allowed to stand. On the 30th October 1877, the Collector of Allahabad granted a license to Walter Newton, Mrs. Newton's husband (at present I understand in England), for the sale of spirituous and fermented liquors in the hotel, and this license bears that it was to have effect from the 30th October to the 31st December 1877. The expiry of the license on the latter date does not appear to have been noticed by the authorities

* [Sec. 32 :—Unless otherwise especially authorized by the Duration and renewal of Chief Revenue authority, licensee for retail sale shall be granted license. for the term of one year, and if continued to the holders thereof, shall be formally renewed from year to year.

But every person holding a license, who may intend not to renew it, shall give notice of his intention to the Collector at least fifteen days before the year expires.

If such notice be not given, and the license be not recalled by the Collector, the license held, and engagement entered into by every such person, shall remain in force as if the said license and engagement had been formally renewed.]

† [Sec. 62 :—Every person other than a licensed manufacturer who manufactures any country spirits, and every person other than a licensed vendor, or a person duly authorized to supply licensed vendors, who sells or sale of country spirits, any spirituous or fermented liquors, or intoxicating drugs, and every person authorized to supply licensed vendors, who sells any such liquors or drugs to any person other than a licensed vendor, shall for every such offence be punished with fine not exceeding five hundred rupees.

Nothing in this section or in section twelve applies to the sale by auction of any spirituous liquors, wines, or beer purchased by any person for his private use and so disposed of upon his quitting a station or after his decease.] *

Proviso.

themselves, and Mrs. Newton went on conducting the hotel, including of course the selling of spirituous and fermented liquors, unmindful of the license until the 11th January, when it suddenly occurred to her to obtain a renewal of it. For that purpose she applied at the Collector's office and obtained a renewal of the license up to the 31st March 1878. Nothing was said to her at the time about her having incurred any of the penalties of the Act, and this perhaps is not to be wondered at, for the neglect to renew the first license, when it expired on the 31st December, was not ascertained [632] by the authorities by means of any enquiries or watchfulness on the part of themselves or their officers, but was simply brought to the knowledge of the Collector by Mrs. Newton herself, and the license was handed back to her with this simple endorsement : "This license is extended up to the 31st March 1878." It is further to be noticed that one of the conditions of the license was that a monthly fee of Rs. 8-5-4 should be paid to Government in advance for every month of the term for which the license was granted, and that all claim in respect of this condition had been fully satisfied, and, indeed, more than satisfied by Mrs. Newton, the whole aggregate fee amounting to Rs. 25 for the three months from the 30th October to the 31st December 1877, having been paid up in advance, and a similar aggregate fee of Rs. 25 for the term from the 1st January till the 31st March 1878, having been paid and accepted by the Government on the 11th January, when the renewal of the license was, without any objection or demur, granted. Now such being the state of the case, I really think that the Assistant Magistrate might have paused and considered whether it was necessary to prosecute Mrs. Newton for the slight illegality she had ostensibly been guilty of in selling spirituous and fermented liquors in her hotel for about ten days without formally renewing her license : and if he had so paused and considered, he might perhaps have seen that the renewal endorsement on the license without any objection stated, and the payment and acceptance in advance of the whole fee due under the license, were strong circumstances of condonement on the part of the Government of any little neglect Mrs. Newton may have been guilty of, and that they showed the possession by Mrs. Newton of a license with all the conditions fulfilled, and more than fulfilled, entitling her to sell spirits and liquors, from the 30th October 1877 to the 31st March 1878, uninterruptedly. Most reasonably therefore might she have believed that she had, although somewhat irregularly yet sufficiently, discharged her duty in the matter, and that she might go on conducting her hotel in peace. But it will scarcely be believed that three days afterwards her assistant, Seymour, was brought up before Mr. Thomson, the Assistant Magistrate, tried and convicted under s. 62 of Act X of 1871, and punished with a fine of Rs. 100 or one month's imprisonment in the Civil Jail, a sentence the [633] severity of which would seem to imply that, in the opinion of the Assistant Magistrate, Mrs. Newton had been guilty of a wilful attempt to defraud the revenue, a view of her conduct, however, which is simply ridiculous, for she and her assistant, Seymour, had merely and unintentionally overlooked for a few days the necessity of renewing the license at the proper time, under the venial and excusable circumstances I have explained. And so far from defrauding the revenue, the Government had not only lost nothing at the *hands* of Mrs. Newton, but had in fact accepted from her more than they were entitled to under their own conditions.

Such being the true state of the case, is this conviction sustainable ? I think not. Section 62 of the Excise Act X of 1871 provides, among other things, that "every person other than a licensed vendor who sells any spirituous or fermented liquors shall for every such offence be punished

with fine not exceeding Rs. 500." Now would it be reasonable to hold, on the facts and on a sound reading of the law, that Mrs. Newton was not a licensed vendor, that is, a vendor altogether unlicensed? At least, after the explanation I have given of the conduct of the authorities, it does not lie in their mouth to contend that between the 1st and 11th January Mrs. Newton was acting without any authority or license from them, and that she had no reason to believe that in their opinion she had violated the law and laid herself open to its penalties. But a careful examination of the Act will show that in no view of the case could Mrs. Newton be regarded as other than a licensed vendor for the whole period up to the 31st March, during which the license was in operation. The portion of the Act dealing with the subject of licenses is ch. vi, including ss. 31 to 35. Sections 31 and 32 deal with licenses for a year. It may be remarked, however, in passing, that s. 32 supplies a strong argument by analogy against the conviction in the present case. By that section it is provided that, where there is an intention not to renew the license, "notice of such intention shall be given to the Collector at least fifteen days before the year expires; and if such notice be not given, and the license be not recalled by the Collector, the license held and engagement entered into by every such person shall remain in force as if the same license and engagement had been formally renewed." There seems no reason why this should not hold good in the case of a license for less than a year, as indeed, [634] as I shall presently show, it rather seems to do, and there is not a word in the Act, from beginning to end, showing it to be the intention of the Legislature that it shall be otherwise in the case of short licenses—a view of their position in this respect which is only too abundantly supported by the conduct of the parties in the present case, and especially on the part of the Government. Section 33 provides that the Chief Revenue authority may regulate the form and condition of all licenses under the Act, and rules for these purposes appear to have been issued, but I do not observe among them any rule relating to the lapsing or renewal of a license for three months. I observe, however, that one of the rules provides that any party shall be at liberty to cancel such a license at the close of any quarter of the year, a provision which previously derives considerable force from that contained in s. 32 to which I have directed attention, and which therefore tells rather against than in favour of his conviction. Section 34 empowers the Collector to recall or cancel any license if the tax or duty therein specified be not paid, or in case of a violation of any other condition thereof, or of the holder being guilty of breach of the peace or any other criminal offence: and the same section proceeds to provide for the case where the Collector desires to recall a license, and s. 35 relates to the surrender of a license by the holder. Now, even if things were entire and there were none of the peculiarities relating to the conduct of the Excise authorities to which I have adverted, I think it would be quite allowable to hold that the term "licensed vendor" in s. 62 must be taken to mean a vendor licensed or unlicensed within the meaning of the section of the Act I have pointed out on licenses generally, and constituting ch. vi, and a person not being in position, as Mrs. Newton plainly is not, cannot be said to have incurred the penalty of s. 62. The only section of the Act which appears to me to have the remotest bearing on such a case as the present is s. 57, which provides for the refusal to produce a license on the demand of an Excise officer, and also for a breach of any of the conditions of the license granted, neither of which circumstances apply to the case of Mrs. Newton, for she was never asked by any Excise officer to produce her license, nor has she committed any breach of any of its conditions. The present case, therefore, appears to me to be wholly unprovided for by the Excise Act X of 1871, and I must add that is very properly unprovided for, for I do not

[635] believe it to have been the intention of the Legislature to punish an innocent person like Mrs. Newton, who was guilty of nothing but a very intelligible, and in my judgment excusable, little neglect or delay, which showed no intention on her part to cause any of the mischief against which the Excise Act is directed.

For these reasons I set aside the conviction and sentence in this case, and direct the fine of Rs. 100, if it had been paid, to be returned to the applicant.

Conviction quashed.

NOTES.

【 See 1 All. 635 ; 638.】

【 1 All. 635]

CRIMINAL JURISDICTION.

The 22nd March, 1878.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE

Empress of India

versus

Dharam Das.

Act X of 1871 (Excise Act), ss. 12, 62, and ch. vi.—Illicit sale of Liquor—License.

D was the holder of a license for the sale of spirituous and fermented liquors by retail for a period terminating on the 31st December 1877. On the 10th January 1878, his license not having been renewed by the Collector *D* sold certain spirits by retail. On these facts he was convicted of illicit sale of liquor. Subsequently to his conviction, his license was renewed. Held that, under such circumstances his conviction was good. *Empress v. Seymour* (see *ante* p. 630) distinguished.

THIS was an application to the High Court for the exercise of its powers of revision under s. 207 of Act X of 1872. The petitioner was the holder of a license for the sale of spirituous and fermented liquors by retail for a period of three months terminating on the 31st December 1877. On the 10th January 1878, his license not having been renewed, he sold certain spirits by retail. On these facts he was convicted by Mr. J. B. Thomson, Magistrate of the first class, of illicit sale of liquor, and under s. 62 of Act X of 1871. The petitioner did not apply for a renewal of his license until after his conviction.

Babu *Jogindra Nath Chaudhri* for the Petitioner.

The Junior Government Pleader (*Babu Dwarka Nath Banarji*) for the Crown.

Stuart, C.J.—The facts in this case are different from those in the case of Charles Seymour (Mr. Newton) (see *ante*, p. 630), for there are none of the circumstances of condonement and estoppel which characterise **[636]** the latter, and the license had clearly and simply expired. In Seymour's case the lapsing of

the first license was not noticed by the authorities, and was only brought to their knowledge by Mrs. Newton herself going to the Collector's office, they simply renewing the license and accepting the whole fee for the new period by anticipation : nor was there in that case anything to show any action on the part of the Collector as to the recalling the license or otherwise within the meaning and scope of ch. vi, of Act X of 1871, or of the rules respecting the license for three months drawn up and issued by the Chief Revenue authority, that is, in these Provinces, the Board of Revenue. I therefore held there that the defendant was not a person other than a licensed vendor within the meaning of s. 62 of the Excise Act.

The present case is quite different, for here we have the license simply expiring, and no attempt whatever on the part of the defendant to renew it, nor does he apply for renewal till after he had been convicted before the Magistrate for selling spirituous liquors without a license. He therefore violated s. 12 of the Excise Act, which provides that "spirituous liquors passed from distilleries according to the English method, fermented liquors manufactured at a licensed brewery, and spirituous and fermented liquors imported either by land or by sea, shall not be sold except under license from the Collector," and laid himself open to the penalty enacted by s. 62. His conviction must therefore stand. But as to the sentence, I do not think that the case is a flagrant or serious one and calling for a severe penalty. Nor can I help remarking on the peculiar nature of the evidence on which the conviction is based. It is not the evidence obtained simply by the testimony of ordinary customers from among the public frequenting the defendant's shop, but by that of a constable sent direct from the Collector's office for the express purpose of detecting or rather involving the defendant in a violation of the Excise Law, and such evidence is, from its very nature, open to remark and even suspicion, although I do not mean to say that the constable who acted in this employment did otherwise than perform his duty fairly. The circumstance, however, in my view takes from the conviction the severo illegality which it otherwise might have shown, and renders a penalty of a fine of Rs. 100, or of one month's imprisonment [637] in the Civil Jail, excessive punishment, and I set that sentence aside, and in lieu of it I consider that one-fourth of the fine imposed by the Assistant Magistrate would be sufficient, and therefore while affirming the conviction, I sentence the defendant to pay a fine of Rs. 25 without the alternative of imprisonment ; the fine, if necessary, to be recovered by distress in due course of law. But if the Rs. 100 has been paid by the defendant, the difference between that sum and the Rs. 25 must be returned to him.

Conviction affirmed.

NOTES.

[See 1 ALL., 638.]

[1 All. 637]
APPELLATE CRIMINAL.

The 2nd April, 1878.

PRESENT:
MR. JUSTICE TURNER.

Empress of India
versus
Megha.

Act XLV of 1860 (Penal Code), s. 75 Punishment.

Held, that where a person commits an offence punishable under ch. xii or ch. xvii of the Indian Penal Code punishable with three years' imprisonment and, previously to his being convicted of such offence, commits another such offence, punishable under either of such chapters, he is not subject, on being convicted of the second offence, to the enhanced punishment provided in s. 75 of the Indian Penal Code.

ON the 22nd January 1878, one Megha was convicted by Mr. H. G. Keene, Sessions Judge of Agra, under ss. 109 and 328 of the Indian Penal Code, of abetting the administering to one Kushal of a stupefying drug with intent to commit theft. In addition to the offence of which he was convicted, he had been charged, under s. 379 of the Indian Penal Code, with theft. On the 29th January 1878, he was convicted, under s. 328 of the Indian Penal Code, of administering to one Ali Bakhsh a stupefying drug with intent to commit theft, and also, under s. 379, of theft. He was sentenced under s. 328 to rigorous imprisonment for ten years, and, with reference to his previous conviction on the 22nd January 1878, under ss. 75 and 379 to transportation for life. Against this second conviction Megha appealed to the High Court, contending that, inasmuch as he had not been found guilty of theft on the 22nd January 1878, s. 75 was not applicable; and that, assuming he had been found guilty of theft on that date, inasmuch as he was not found guilty until after he committed the theft of [638] which he was subsequently found guilty on the 29th January, he was not subject to enhanced punishment under s. 75.

Mr. L. Dillon for the Appellant.

Turner, J.—I am unable to support the enhanced sentence passed by the Judge under s. 75. That section declares that if any person *having been convicted* of any offence punishable under certain parts of the Indian Penal Code, *shall be guilty* of any offence punishable under those parts of the Code, he shall for every such *subsequent* offence be liable to the penalties therein declared. The section then prescribes enhanced punishments for particular offences committed after conviction of any one of such offences and not merely on a second conviction. In the present case it is shown that the appellant had, a few days before the trial of the present offence, been convicted, but it is not shown that he had been convicted of one of the offences mentioned in s. 75, nor that he had been convicted of any offence before the commission of the offence for which he has received an enhanced sentence under s. 75 of the Indian Penal Code. I must quash the sentence passed under ss. 379 and 75 of the Code, and as the appellant has received the full punishment that could be awarded for an offence falling at the same time under ss. 328 and 379 of the Indian Penal Code, it is unnecessary to pass a sentence under s. 379 of the Indian Penal Code. The conviction and sentence under s. 328 are affirmed and the appeal dismissed.

Appeal dismissed.

CRIMINAL JURISDICTION.

The 4th April, 1878.

PRESENT :

MR. JUSTICE TURNER.

Empress of India
versus
 Mahindra Lal and another.

Act X of 1871 (Excise Act), ss. 32, 57, 62—Illicit sale—License.

.*t* held a license for the sale of spirituous and fermented liquors by retail for a period of three months terminating on the 31st December 1877. Prior to the 8th January 1878, no notice was given by .*t* of her intention not to renew the license, nor had the license been recalled by the Collector. Between the 1st January 1878, and the 8th January 1878 both days inclusive, .*t*'s servants sold spirituous and fermented liquors by retail. On these facts .*A*'s servants were convicted under s. 62 of Act X of 1871,* of the illicit sale of liquor. *Held*, following the opinion expressed in *Empress v. Seymour* (see *ante*, p. 690) that the convictions were bad, as .*A*'s license, under the provisions of [639] s. 22 of that Act, remained in force until she gave notice of her intention not to renew it or it was recalled by the Collector. The principle of the decision in *Empress v. Seymour* dissented from.

.*t* should have been prosecuted under s. 57 of the Excise Act for not paying her monthly fee in advance.

THIS was a reference by Mr. H. Lushington, Sessions Judge of Allahabad, under s. 296 of Act X of 1872, for the orders of the High Court. The Sessions Judge referred the proceedings of Mr. J. B. Thomson, Magistrate of the first class, in the case of Mahindra Lal and Nilmoni Deh. These persons were convicted by the Magistrate, under s. 62¹ of Act X of 1871, of selling liquor without a license from the Collector. The Sessions Judge referred the proceedings on the ground that the Magistrate's order was contrary to law.

Babu *Jogindro Nath Chaudhri* for Mahindra Lal and Nilmoni Deh.

The Junior Government Pleader (*Babu Dwarka Nath Banarji*) for the Crown.

Turner, J. —It appears that licenses for the sale of spirituous and fermented liquors by retail may be granted in the North-Western Provinces for any term not less than three calendar months and not exceeding one calendar year, and that in Allahabad they are usually granted for a period of three months. The fee leviable on such licenses in Allahabad is Rs. 8 per mensem, and it is a condition of the license that the fee should be paid in advance. The petitioners' mistress held a license for the sale of fermented liquors by retail for the period of three months, terminating on the 31st December 1877. The holder of the license did not give to the Collector any notice of her intention not to renew the license, nor had the license been recalled by the Collector prior to the 8th January 1878. From the 1st to the 7th January 1878, inclusive, the petitioners admit they sold by retail spirituous or fermented liquors. On these facts the Magistrate convicted them for that, not being licensed vendors, they sold spirituous or fermented liquors on diverse dates from

*[*a. r. supra, text. 1 All. 690*]

the 1st January to the 7th January 1878, inclusive, and under s. 62 * of the Excise Act sentenced them to pay a fine of Rs. 100, or to undergo imprisonment for one month in the Civil Jail.

[640.] It is contended that the conviction is wrong in that the petitioners were not unlicensed vendors, but sold under a license subsisting under the provisions of s. 32 ! of the Act, seeing that their mistress had given no notice of her intention not to renew it, and it had not been recalled by the Collector.

The pleader for the petitioners relies on *Empress v. Seymour* (see *ante*, p. 630) decided by the learned Chief Justice of this Court on the 25th February last. The facts of that case are much the same as those of the present. The defendant was the servant of a person named Newton who held a license for a term of three months expiring on the 31st December 1877. The license was not formally renewed until the 11th January 1877, when the proper fee was paid. Sales had nevertheless been made between January 1st and January 11th, and on account of these sales the defendant Seymour was prosecuted and convicted. The learned Chief Justice considered that any breach of the Act committed by the defendant had been condoned by the action of the Collector in receiving the fee and renewing the license, but he doubted whether, in advertence to the terms of s. 32 of the Excise Act, the master of Seymour could be held to be unlicensed, and therefore whether any offence had been committed. His Honour called attention to the absence from the Act and the rules of any direction as to the period within which the license was to be renewed. In the result he quashed the conviction. On the other hand the Government Pleader relies on a subsequent ruling by the same learned Judge. In *Empress v. Dharam Das* (see *ante*, p. 635) the facts differ from those of Seymour's case only to this extent, that it was not shown the license had been renewed and the fee paid subsequently to the sales which led to the conviction. It, however, appears that on the 11th January, the same day on which the fee was accepted in Seymour's case, the defendant brought the fee into Court and tendered payment of it. In this case the learned Chief Justice supported the conviction. He distinguished it from Seymour's case, on the ground that in the latter there were circumstances of condonement in the acceptance of the fee and renewal of the license, while in the case of Dharam Das these circumstances were absent. Although in his petition Dharam Das urged that, in reference to the provisions of s. 32 of the Excise Act, he [641] could not be held to be an unlicensed vendor, it would seem that this argument was not pressed at the hearing for it is unnoticed in the judgment. The *Government Pleader* urges that, inasmuch as the Collector had not accepted the fee in the case before me, the decision must follow the ruling in Dharam Das's and not the ruling in Seymour's case, but I am constrained to say that I cannot regard the acceptance by the Excise authorities of an excise fee in ignorance of a contravention of the law as a condonation of the offence if the offence had been committed. The acceptance of the fee would not warrant the quashing of a conviction for sales made prior

* [*g. v. supra, text*, 1 All. 630.]

! [Sec. 32 :—Unless otherwise especially authorized by the Chief Revenue authority, licenses for retail sale shall be granted for the term of one year. Duration and renewal of and if continued to the holders thereof, shall be formally renewed license. from year to year.

But every person holding a license, who may intend not to renew it shall give notice of his intention to the Collector at least fifteen days before the year expires.

If such notice be not given, and the license be not recalled by the Collector, the license held, and engagement entered into by every such person, shall remain in force as if the said license and engagement had been formally renewed.]

to the acceptance of the fee, if those sales were in fact illegal; and if the sales on which the prosecution was founded were illegal in Dharam Das's case, I should have held them equally illegal in Seymour's case. Even assuming the excise fee had been received with a full knowledge of the circumstances, I should hold that this might be ground for inflicting a light penalty and not for quashing the conviction. But I entirely agree with the reasoning of the learned Chief Justice in that part of the judgment in Seymour's case in which he gives expression to his doubts as to the legality of the conviction in reference to the terms of s. 32 of the Excise Act. The section declares that, unless otherwise specially authorised by the Chief Revenue authority, licenses for retail sales shall be granted for one year, and if continued to the holders thereof, shall be formally renewed from year to year, but that every person holding such a license who may intend not to renew it shall give notice of his intention to the Collector, at least fifteen days before the year expires, and that if such notice be not given and the license be not recalled by the Collector, the license held and engagement entered into by every such person shall remain in force as if the said license had been formally renewed. By the rules made by the Chief Revenue authority in these Provinces licenses may and in practice are granted for periods of three months. To these licenses the provisions of s. 32 are clearly applicable. Notice must be given of the intention not to renew the license, and if no such notice is given and the license is not recalled, the license granted to, and the engagement taken from, the holder of the license remain in force as if they had been formally renewed. The *Government Pleader* has argued that this is to be read as implying that the holder of the license is to be held to his engagements, that he is responsible for the fee and for the performance of the conditions of the license, but that the authority conferred by the license no [642] longer subsists. I cannot accede to a construction which is at variance with the clear language of the Act,—“the license held shall remain in force as if the said license had been formally renewed.” If it had been formally renewed it could not be doubted the holder would be a licensed vendor, and enjoy the privilege conferred by the license. Inasmuch as no notice has been given of an intention not to renew it and it has not been recalled, the holder still enjoys the privilege of selling in virtue of the authority conferred by it, while on the other hand he is liable to the payment of the fee and the performance of the other conditions imposed on him. On the facts found or allowed in this case, the petitioners cannot be convicted as unlicensed vendors. The sales admitted by them were made in virtue of the license which under the terms of s. 32 was still subsisting. The convictions must then be quashed and the fines remitted.

It would certainly be well that the Chief Revenue authority should prescribe some period within which licenses should be brought for renewal, but as the law and rules now stand there is a remedy for any negligence on the part of the holder of the license. He is bound by a condition of his license to pay the monthly fee in advance. If he omits to do so he can be prosecuted for the breach under s. 57 of the Excise Act, and is liable to a fine of Rs. 50. In quashing the convictions under s. 62, I am urged to convict the petitioners under s. 57, but the petitioners are not the holders of the license, they are the servants of the holder.

Convictions quashed.

[1 ALL. 643]

APPELLATE CIVIL.

The 12th April, 1878.

PRESENT :

MR. JUSTICE PEARSON AND MR. JUSTICE TURNER.

Rahmani Bibi and others.....Defendants

versus

Hulasa Kuar and another.....Plaintiffs.*

Redemption of mortgage—Acknowledgment of the mortgagor's title signed by mortgagee's agent—Act IX of 1871 (Limitation Act), sch. ii, art. 148.

Held, following the decision of the Privy Council in *Lachmee Buksh Roy v. Ranjeet Roy Panday* (13 B. L. R., 177) under Act XIV of 1859, that an acknowledgment of [643] the title of the mortgagor or of his right of redemption signed by the mortgagee's agent is not sufficient, under art. 148, sch. ii of Act IX of 1871, to create a new period of limitation.

THIS was a suit to recover possession of a certain share in a certain village, which share the plaintiffs alleged had been mortgaged by their ancestor, Karim Dad Khan, to the ancestor of the defendants 42 years before suit. The defendants alleged that the property had been mortgaged 70 years before suit. The administration-paper framed at the fifth settlement of the village, bearing date the 29th June 1840, had been signed for the mortgagee by his Karinda, or agent, and contained the following clause: "The share of Karim Dad Khan is mortgaged to me, when his heirs pay the mortgage-money they can redeem it from mortgage." The Court of First Instance did not determine the date of the mortgage, as it held that the administration-paper contained an acknowledgment of the title of the mortgagor creating, under the provisions of art. 148, sch. ii of Act IX of 1871, a new period of limitation, and gave the plaintiff a decree, which was affirmed on appeal by the defendants to the lower Appellate Court.

On appeal to the High Court by the defendants, they contended that the acknowledgment on which the lower Courts had relied was not sufficient in law to create a new period of limitation, inasmuch as it was signed by an agent only.

Lala Lalta Prasad for the Appellants.

Pandit Bishambhar Nath for the Respondents.

The Court made the following

Order of Remand:—It having been ruled by the Privy Council (see *Lachmee Buksh Roy v. Ranjeet Roy Panday*, 13 B. L. R., 177) that signature by an agent is not sufficient to satisfy the analogous terms of Act XIV of 1859, we must hold that the acknowledgment in this case is insufficient. Of course we are now considering the acknowledgment required under Act IX of 1871 and not under the present law, of which the terms are more equitable.

* Second Appeal, No. 1208 of 1877, from a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 31st May 1877, affirming a decree of Munshi Man Mohan Lal, Munsif of Fatehpur, dated the 25th November 1875.

The lower Appellate Court must determine whether this suit has been instituted within 60 years from the date on which the mortgage was made. It will try this issue and remit its finding to this Court, when ten days will be allowed for objections.

Issue referred.

NOTES.

[See also 27 Cal. 1004 P.C.; 17 Bom. 178; 1 A.L.J. 855.]

[644] APPELLATE CIVIL.

The 24th April, 1878.

PRESENT:

SIR ROBERT STUART, K.T., CHIEF JUSTICE, AND MR. JUSTICE SPANKIE.

Jawahir Lal and others.....Defendants
versus

Narain Das and others.....Plaintiffs.*

Application for leave to appeal to Her Majesty in Council—Limitation—Act X of 1877 (Civil Procedure Code), ch. XLV—Act XV of 1877 (Limitation Act), ss. 4, 12, and sch. ii, art. 177.

Held (*Per* STUART, C.J., SPANKIE, J., dissenting) that, in computing the period of limitation prescribed by art. 177, sch. ii of Act XV of 1877, for an application for leave to appeal to Her Majesty in Council, the time requisite for obtaining a copy of the judgment on which the decree against which leave to appeal is sought is founded cannot be excluded under the provisions of s. 12^t of Act XV of 1877.

THIS was an application to the High Court for leave to appeal to Her Majesty in Council from a decree of the High Court, dated the 20th August 1877. The application was preferred on the 27th February 1878, or seven days beyond the time allowed by art. 177, sch. ii of Act XV of 1877, for preferring an application for leave to appeal to Her Majesty in Council.

Mr. Colvin for the Petitioners, contended that, in computing the period of limitation, the time requisite for obtaining a copy of the judgment on which the decree against which leave to appeal was sought was founded should be excluded—s. 12 of Act XV of 1877.

Mr. Conlan, Pandits Bishambhar Nath and Ajudhia Nath, and Munshi Hanuman Prasad for the Opposite Parties.

* Application, No. 4 of 1878, for leave to appeal to Her Majesty in Council.

† [Sec. 12 :—In computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded.

In computing the period of limitation prescribed for an appeal, an application for leave to

appeal as a pauper, and an application, for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed against or sought to be reviewed, shall be excluded. Where a decree is appealed against or sought to be

reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded.

In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.]

Stuart, C.J.—An application for leave to appeal to Her Majesty in Council having been filed, the question we have to consider is whether the application is within the time (six months) provided by the Procedure Code, Act X of 1877, and by the Limitation Act, XV of 1877, sch. ii, No. 177, or whether it is beyond time. The limitation in such cases was previously that provided by s. 599^{*} of the Procedure Code, but that section is repealed by the present Limitation Act XV of 1877, and without any substitute for it other than [645] that contained in No. 177 of sch. ii. The date of the decree was the 20th August 1877, and if nothing could be shown to have interrupted the running of the limitation period, the six months expired on the 20th February 1878. But the present application for leave to appeal to Her Majesty in Council was not filed till the 27th February, that is, as reported by the office, it was seven days beyond time. It was not explained why this application had been delayed till the last moment, till, indeed, after the expiry of the six months, but Mr. Colvin stated that the defendant was now anxious to appeal to the Privy Council, and he argued that he is entitled to seven days beyond the 20th February under s. 12 of the Limitation Act XV of 1877, inasmuch as he is entitled to have reckoned the time requisite for obtaining a copy of the judgment appealed against, as provided by that section. It appears that the defendant applied for a copy of the judgment on the 22nd September, and that it was ready for him on the 28th, although it was stated that he did not actually receive it till the 29th, but in either case, whether the 28th or 29th, he would be entitled to add seven additional days to the period, and his application would be within time. In fact, the seven days would bring him to the 27th February, the very day on which the application for leave to appeal to Her Majesty's Privy Council was made. Mr. Colvin enforced his argument by referring to s. 4 of the Limitation Act, which is in these terms: "Subject to the provision, contained in ss. 5 to 25 (inclusive), every suit instituted, appeal presented, and application made, after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence"; s. 12 is thus included among those sections. The portion of s. 12 of the Limitation Act relied on is as follows: "Where a decree is appealed against or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded." What is the meaning here of the expression "where a decree is appealed against"? In the sections of the Code of Procedure relating to appeals to the Privy Council, there is a clear distinction between applications or petitions to appeal and appeals themselves, i.e., admitted appeals, and if this portion of s. 12 of the Limitation Act be taken literally, it applies to an appeal alone and not to an application. But if that be [646] so, where is the necessity for a copy of the judgment? That document can only be required for the preparation of the reasons of appeal which are only appropriate to an application, and are evidently not wanted in the case of an admitted appeal. The rather unfortunate and ambiguous expression, therefore, "where a decree is appealed against," must, I think, be understood to mean a proceeding in the way of appeal for which a copy of the judgment is required. It plainly is not required for an admitted appeal, while it is as plainly necessary to an application to appeal. Notwithstanding therefore the obscure and doubtful expression in this part of s. 12 of the Limitation Act, "where a decree is appealed against," I think we must understand by it an application, or proceeding in the nature of an application, to appeal, and therefore if this part of s. 12 applies to

* [See 599 : - Such application must ordinarily be made within time within which six months from the date of such decree. Application must be made. But if that period expires when the Court is closed, the application may be made on the day that the Court re-opens.]

appeals to the Privy Council, Mr. Colvin's contention is right, and his application within time.

But I am of opinion that this provision of s. 12 of the Limitation Act does not apply to Privy Council appeals. As for s. 4, even if relevant to some extent to the present case, it does not follow that it compels us to apply to the present case the *whole* provisions of s. 12, but only such one or more of them as are appropriate to an application to appeal to the Privy Council. Section 4 does not say subject to *all* the provisions, but simply to the "provisions," by which I think may fairly be argued is meant such provisions as are applicable and pertinent to the suit, appeal, or application, as it may be. For instance, the first part of s. 12, providing that the day from which the period of limitation is to be reckoned shall be excluded, may of course be applied to the present case. In this view of s. 4, the nature and legal character and conditions of the application or other proceeding must not be forgotten. And if in laying down this principle I am right, then we need not apply the provisions of s. 12 of the Limitation Act to such a case as the present, unless it can be shown that a copy of the judgment is essential to the necessary purpose of an application to appeal to the Privy Council. Now I think it must be conceded that a copy of the judgment is not needed for any such purpose. The procedure and all questions relating to Privy Council appeals ought to be determined solely with reference to the provisions contained in the sections of the Code of Civil Procedure which regulate such appeals. These sections are [647] twenty-three in number and form ch. xlv of the Code headed "Of Appeals to the Queen in Council," and it is quite distinct in itself, comprising within its provisions the whole particulars of procedure necessary in such cases. If a copy of the judgment appealed against had, in the mind of the Legislature, been considered essential, the Code no doubt would have been made so to provide, but neither in the Code itself nor in the Limitation Act is there any express provision of the kind, and it could not, I think, be urged that a copy of the judgment appealed is a requirement suitable to and called for in such an application as this. In an ordinary application to ~~admit~~ an appeal the record is not here, but in the district where the original suit was instituted, and a copy of the judgment is necessary to enable an appellant here to prepare his reasons. But for the purpose of an application to appeal from a judgment of a High Court to the Privy Council a copy of the judgment is plainly not wanted either by the parties or by the Court, for the record itself is here in the High Court, containing not merely a copy, but the judgment and order actually delivered, together with the whole proceedings in the original district and also in the High Court, and this record is therefore necessarily at hand for use by the parties or by the Judges, and the authentic instruction thus to be obtained must obviously be of greater service than a mere copy of the judgment. When, after admission by the High Court in India, the appeal gets to the Privy Council, it is subjected there to a different ordeal altogether, the cases for the appellant and the respondent, with their reasons respectively, being prepared by their Counsel in London. Neither therefore on the true constructions of ss. 4 and 12 of the Limitation Act XV of 1877, nor by any provision of the Procedure Code, nor for any necessary purpose, does that section apply to Privy Council appeals.

I have observed that the limitation applicable to appeals of this nature was previously that provided by s. 599 of the new Procedure Code, but that section has been repealed by the present Limitation Act, and the limitation now substituted for it by No. 177, sch. ii, is distinct and imperative and, cannot, in my opinion, be enlarged or in any way qualified by s. 12 of the same

Act. The intention evidently was to allow the six months and no more, and that that [648] long period was considered to be, as it assuredly is, sufficient for all purposes, and not, I am persuaded, that it was intended to add to the six months by the few days that might be occupied in obtaining a copy of the judgment appealed against.

I am therefore of opinion that the seven days, which it is contended ought to be deducted from the time that has run from the date of the decree till the date of this application, cannot be allowed : and the only question is whether the six months provided by the Limitation Act XV of 1877, sch. ii, No. 177, had expired when this application was presented. It clearly had expired. The date of the decree proposed to be appealed to the Privy Council is the 20th August 1877, and the six months had therefore run out on the 20th of the following February. For these reasons I consider that the report of the Officer is right, and that this application must be refused, but under the circumstances without costs.

Spankie, J. —Section 599 of Act X of 1877 provided for the limitation of appeals to Her Majesty in Council, but the section was repealed by Act XV of 1877. The limitation now provided is that to be found at art. 177, sch. ii, third division, applications, of Act XV of 1877, and the application is thus described : "For the admission of an appeal to Her Majesty in Council, six months" and the "time from which the period of limitation begins to run" is "from the date of the decree appealed against." Act XV of 1877 amends the law relating to the limitation of (i) suits, (ii) appeals, and (iii) certain applications to Courts. By s. 4, subject, however, to the provisions contained in ss. 5 to 25 inclusive, every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule of the Act shall be dismissed. Every application made for which limitation is prescribed in the schedule is apparently brought under s. 4, and is subject to the provisions contained in ss. 5 to 25 inclusive. If we can find a place for the application before us in any one of these sections, its limitation is saved thereby, and it should be admitted, though after time. The second schedule, "appeals," provides the limitation in cases of appeals from the decrees and orders of the local Courts to Appellate Courts *within this country*. An appeal subject to such rules as may from time to time be made by Her Majesty [649] in Council regarding appeals from Courts in British India and to the provisions contained in ch. xlvi of Act X of 1877 shall lie to Her Majesty in Council (s. 595 of Act X of 1877). Under the provisions of the Limitation Act application for leave to appeal to Her Majesty in Council, required by s. 598 of Act X of 1877, must be made within six months from the date of the decree appealed against. Therefore the application for leave to appeal is the first step in the appeal itself allowed by right, but subject to conditions. Its object is to appeal the decree, and limitation runs from the date of the decree appealed against. The application for leave to appeal to Her Majesty in Council is the petition referred to in s. 598 of Act X of 1877 in the following words : "Whoever desires to appeal under this chapter to Her Majesty in Council must apply by petition to the Court whose decree is complained of." The petition then is the expression of the desire of the petitioner to appeal to the Queen. It is not an appeal to the Court whose decree is complained of, but it is the mode by which the appeal to Her Majesty in Council must be presented with a view of its being transmitted to England with the record, provided the petitioner fulfils the prescribed conditions. It is then, under s. 603, formally admitted as an appeal ; no further petition is required : the original petition is the appeal to Her Majesty. By s. 600 the petition must state the grounds of appeal from the

decree, for the appeal allowed is from the decree (*vide* s. 595^{*}). The grounds of appeal from the decree must be looked for in the judgment, and by s. 594 of Act X of 1877, in the chapter relating to appeals to the Queen in Council, unless there be something repugnant in the subject or context, the expression "decree" includes the judgment and order. Thus the petition really is the appeal to the Queen in Council, and therefore the time requisite for obtaining a copy of the judgment on which it is founded must also be excluded. This appears from the third paragraph of s. 12† of the Limitation Act, and it is unaffected by paragraph 1 and paragraph 2 of the section, which deal with appeals generally and particular applications, whereas paragraph 3 is exclusively confined to *decrees* appealed against or sought to be reversed. I am therefore of opinion that Mr. Colvin is right in his contention and the petition is within time.

NOTES.

【For similar rulings, see, 19 Bom. 301; 10 Mad. 373; 15 Mad. 169; 15 All. 11; 28 All. 391; 6 All. 250 F.B.; 21 M. L. J. 100.】

* [Sect. 595 :—Subject to such rules as may, from time to time, be made by Her Majesty in Council regarding appeals from the Courts of British India, when appeals lie to and to the provisions hereinafter contained—an appeal shall lie to Her Majesty in Council

- (a) from any final decree passed on appeal by a High Court or other Court of final appellate jurisdiction,
- (b) from any final decree passed by a High Court in the exercise of original civil jurisdiction, and
- (c) from any decree, when the case, as hereinafter provided, is certified to be a fit one for appeal to Her Majesty in Council.]

† [q. r. supra 1 All. 644.]

[659] APPELLATE CIVIL.

The 25th April, 1878.

PRESENT :

MR. JUSTICE PEARSON AND MR. JUSTICE OLDFIELD.

Kaleshar Prasad Plaintiff

versus

Jagan Nath and another Defendants.*

Act VIII of 1859 (Civil Procedure Code), s. 7 - Relinquishment or omission of Portion of Claim.

Held, where two suits were instituted simultaneously, and one of such suits had been determined, that, assuming that the claims in such suits arose out of the same cause of action and should have been included in one suit, the provisions of s. 7 of Act VIII of 1859 were no bar to the entertainment of the second suit.

THIS was a suit under Act XVIII of 1873 for an account of the profits of the sir-land appertaining to a certain mahal for the years 1281, 1282, and 1283 fasli. This sir-land was held by the plaintiff in the suit and the defendants, Jagan Nath and Bala Nand, as coparceners in equal shares. The suit was instituted on the 9th July 1877. On the same date, at the same time as it was instituted, the plaintiff also instituted a suit against Jagan Nath as lambardar of the mahal for his share of its profits for the years 1281 and 1282 fasli. Having regard to this suit, which had been determined, the Court of First Instance held that the present suit was barred by s. 7 of Act VIII of 1859. On appeal by the plaintiff the lower Appellate Court also held that the suit was barred by s. 7 of Act VIII of 1859.

The plaintiff appealed to the High Court, contending that, as both suits were instituted simultaneously, s. 7 of Act VIII of 1859 was not applicable.

Munshi Sukh Ram for the Appellant.

Pandit Bishambher Nath and Ajudhia Nath for the Respondents.

The Court delivered the following

Judgment:—The plaintiff instituted two suits at the same time, one against Jagan Nath, lambardar, for profits of the mauza for 1281 and 1282 fasli, the other against Jagan Nath and another share holder, Bala Nand, for a settlement of the account of sir-land held jointly by the parties for 1281, 1282, and 1283 fasli. This last suit is the subject of appeal, and was dismissed with reference to the [651] provisions of s. 7 of Act VIII of 1859. The provisions of this section do not appear to us to apply. The suit which is the subject of appeal is for an adjustment of the account of profits of sir-land between not only the plaintiff and Jagan Nath, but between them and a third shareholder who is also a defendant, and it is not clear that the accounts of this sir-land are included in the general account of the profits of the village for which the lambardar is responsible to

* Second Appeal, No. 85 of 1878, from a decree of R. F. Saunders, Esq., Judge of Farukhabad, dated the 9th November 1877, affirming a decree of J. L. Denniston, Esq., Assistant Collector of Farukhabad, dated the 20th August 1877.

account to the plaintiff, so as to give in both suits the same cause of action to the plaintiff against Jagan Nath. But were it so, the suit would not be necessarily unmaintainable against Bala Nand, and besides we should hesitate to rule that the provisions of s. 7 of Act VIII of 1859 are applicable to such a case as this. Here the plaints in the two suits were filed at the same time. We cannot say that one suit has a priority over the other in point of time. The claims were divided for the convenience of trial, but there was no relinquishment of a claim, and there will be no question of entertaining a suit after such relinquishment or omission within the meaning of s. 7. There was no institution and entertainment of a suit after one had been already instituted and determined. The suits were not successive, but simultaneous, and to allow the objection, which can only be one of form and not of substance, would be to strain the obvious object of s. 7, which is not to allow persons to be harassed by successive claims. If the Court in which the plaints were filed considered they should have been tried together, the proper course was to allow one of the plaints to be amended, so as to combine both claims. As this suit has not been tried, and is one for a Revenue Court to determine, we reverse the decisions of the Courts and remand the case for trial on the merits to the Court of First Instance. Costs to abide the result.

Cause remanded.

NOTES.

[For other rulings on this subject of simultaneous suits, see (1886) 9 Mad. 279; (1884) 8 Mad. 147; (1893) 16 All. 165.]

[1 All. 681]

APPELLATE CIVIL.

The 30th April, 1878.

PRESENT:

MR. JUSTICE PEARSON AND MR. JUSTICE TURNER.

Pitam Singh and others.....Defendants

versus

Ujagar Singh.....Plaintiff.^{*}

Hindu Law—Joint and undivided ancestral property—Separate property—Compromise.

Certain ancestral estate was recorded as held in equal shares by four [682] brothers, A, B, C and D. On A's death, his son E was recorded as the holder of his share. On the deaths of

* First Appeal, No 122 of 1877, from a decree of Maulvi Hamid Hasan Khan, Subordinate Judge of Mainpuri, dated the 29th September 1877.

B and *D*, *C* was at first recorded as the owner of their shares. Shortly afterwards *B*'s widow, *F*, and *D*'s widow, *G*, were recorded as the holders of their husband's shares. Again, at a later period, the names of *H* and *I*, the sons of *E*, were submitted for those of the widows. The estate was subsequently sold for arrears of Government revenue, but a farm of it was given to *H*, *H*, *I*, and *C*. In 1853, the Government having purchased the estate proposed to re-grant it to the old zamindars and farmers, and a report regarding the ownership of the estate was called for. It was reported that it appeared from the statements of *E* and *J*, the son of *C*, that the widows of *B* and *D* had made a gift of their shares to *H* and *I*. In 1853 *E*, *J*, *H*, and *I* were asked by the Collector in what manner they proposed to divide the estate if it were granted to them, and they replied that they would hold it in equal shares. The estate was eventually granted to these persons on payment of the arrears of revenue. Each of them contributed his quota in making such payment. In 1855 an administration-paper was framed in which they were entered, at their own request, as in possession each of equal shares. In 1864 they agreed to a partition of the shares by arbitration. These proceedings were stopped by *J* advancing a claim to a moiety of the estate. In March 1867, *J* sued for possession of a moiety of the share originally held by *B*'s widow, then deceased, and for a declaration of his right to a moiety of the share held originally by *D*'s widow. In June 1867, the parties to the suit effected a compromise, agreeing to divide the estate into four lots on certain conditions. A decree was accordingly passed in the terms of the compromise. *K*, *J*'s son, sued in 1876, in his father's lifetime, to obtain the same relief as his father had sought in 1867, and a declaration that the arrangement effected by the compromise and the decree was ineffectual. Held that, assuming that the estate was joint until 1867, *K* was, in the absence of fraud, bound by the compromise entered into by his father, and his suit was not maintainable.

Assuming that the estate was held in separate shares, the shares of *K*'s great uncles descended as inheritance liable to obstruction, and *K* could not have questioned his father's acts.

THIS was a suit for the possession of a certain share in a certain village. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the defendants in the suit appealed from the decree of the Court of First Instance.

Munshi Hanuman Prasad and Pandit Bishambhar Nath and Nand Lal for the Appellants.

Mr. Conlan, the Junior Government Pleader (Babu Dwarka Nath Banarji), and Pandit Ajudhia Nath for the Respondent.

The Judgment of the Court was delivered by

Turner, J.—The common ancestor to the parties to this suit was Anand Singh, who had five sons, Chattar Singh who died with [653] out issue, Darjan Singh who died in 1823 leaving a son, Chakarpan, Sundar Singh who died in 1826 leaving a widow, Gulab Kuar, Des Raj who died in 1852 leaving a son, Gandharp Singh, and Chattarpat who died in 1829 leaving a widow, Sahib Kuar. Chakarpan had three sons, who are the appellants; and Gandharp Singh had two sons, Ujagar Singh, the respondent, and Madho Singh, who is still a minor. The estates in suit was, after Chattar Singh's death, originally recorded as held in four shares of 5 biswas each, held respectively by Darjan Singh, Sundar Singh, Des Raj, and Chattarpat. On the death of Darjan Singh, Chakarpan was entered as the holder of his share, and after the deaths of Sundar Singh and Chattarpat, Des Raj was at first recorded as the owner of their shares, but shortly afterwards the name of the widows Gulab Kuar and Sahib Kuar were entered as the holders of their husbands' shares. Again, at a later period, the names of Ajudhia Prasad and

Budh Singh, who were then aged four and two years old respectively, were substituted for those of the widows. The estate fell into arrears, and was eventually sold at auction for a balance of Government revenue, but a farm was given to Chakarpan, Ajudhia Prasad, Budh Singh, and Des Raj. In 1853 the Government having purchased the estate at auction-sale proposed to re-grant it to the old zamindars and farmers, and a report regarding the ownership of the estate was called for. The Tahsildar reported that it appeared from the statement of Chakarpan and Gandharp Singh, son of Des Raj, that the widows of Sundar Singh and Chattarpat had made a gift of their shares to Ajudhia Prasad and Budh Singh by deeds attested by the kanungo, and the kanungo confirmed the statement. On the 2nd May 1853, the Collector of Farukhabad inquired of Chakarpan, Gandharp Singh, Budh Singh, and Ajudhia Prasad in what manner they proposed to divide the estate among themselves if it was granted to them by the Government, and they replied that all four would hold five biswas each. The Government eventually agreed to grant the estate on condition that the arrears of revenue which had accrued when the estate was sold should be discharged. This offer was accepted, and each of the four persons above-mentioned contributed his quota. On the 3rd April 1855, the same persons appeared before the Revenue officer, and requested that each of them might be recorded [654] as the owner of five biswas, and that Chakarpan and Gandharp Singh should be entered as lambardars, and Ajudhia Prasad and Budh Singh as pattidars. It was ordered that a village administration-paper should be prepared, and in that document, which is dated the 5th April 1855, they were entered as in possession each of five biswas. So matters continued until 1864, when, on the 15th November, they agreed to the appointment of arbitrators and an umpire to divide these shares. The arbitration proceedings lasted for upwards of two years, when Gandharp Singh advanced a claim to a ten biswas share, and the arbitrators refused to proceed with their award.

On the 29th March 1867, Gandharp Singh brought a suit to obtain possession of a two and-a-half biswas shares out of the five biswas originally held by Gulab Kuar, then deceased, and for a declaration of his right to a two and-a-half biswas share out of the five biswas originally held by Sahib Kuar. He alleged that each of the four sons of Anand Singh had, on the death of Chattar Singh, obtained a five biswas share; that the widows of Sundar Singh and Chattarpat had been recorded as the holders of their respective husband's shares to ensure their maintenance; that these ladies had in 1855 appointed Ajudhia Prasad and Budh Singh their agents to take the account of the profit and loss on these shares, and that in the lifetime of the ladies Chakarpan wrongfully procured the substitution of his sons' names for the names of the widows. He claimed that the estate of Sundar descended on the death of his widow to Chakarpan and Des Raj, and that on the death of Sahib Kuar he would become entitled to possession of one moiety of her share. On the 26th June 1867, the parties to the suit effected a compromise, agreeing to divide the estate into four lots on the conditions set out in their petition to the Court. A decree was accordingly passed in the terms of the compromise. The respondent now sues to obtain the same relief as was sought by his father in 1867, and a declaration that the arrangement effected by the compromise and the decree are ineffectual. The respondent's father is still alive. There is this difference between the claim asserted by the respondent and his father, that the latter treated the estate as held in separate shares, the former asserts the estate remained joint until 1867. If by "joint" he means undivided, there is no difference in [655] the claims. The Subordinate Judge has decreed the claim. It appears to us impossible to support the decree. Assuming, which is not certainly proved,

that the family remained joint until 1867, the respondent's father for all intents and purposes represented the interest in the estate which devolved and would on partition fall to the separate share of himself and his children, and the respondent must be bound by his acts, unless he can show such fraud and collusion as would entitle him to relief on those grounds. Of this there is no evidence. On the contrary, Gandharp Singh asserted his claim, and if he forbore to press it in view of the circumstances to which we have adverted, it can hardly be doubted he prudently put an end to litigation which must have resulted in failure. There can hardly be a question that the shares of Sundar Singh and Chattarpat were entered in the names of Ajudhia Prasad and Budh Singh,* then mere children, with the consent of Des Raj. Gandharp had by his declarations in 1853 and 1855 provided cogent evidence of his own acquiescence, and had this been absent, there was the difficulty in his way that the property had been granted to Ajudhia Prasad and Budh Singh by the Government. If as there is strong evidence to show, the property was held in separate shares, the shares of the great uncles of the respondent descended as inheritance liable to obstruction, and he could not question his father's acts. For the reason that there is no proof of any fraud or collusion on the part of Gandharp Singh in entering into the compromise of 1867, the suit cannot be maintained. The appeal is decreed and the suit dismissed with costs.

Appeal allowed.

NOTES.

[This case was affirmed by the Privy Council in (1881) 4 All. 120 P.C. See the notes to that case.]

[**1 All. 655**]

APPELLATE CIVIL.

The 30th April, 1878.

PRESENT :

MR. JUSTICE PEARSON, AND MR. JUSTICE OLDFIELD.

Ali Muhammad and others.....Plaintiff's
versus

Lalta Bakhsh and others.....Defendants.

Redemption of mortgage—Adverse possession—Act IX of 1871 (Limitation Act), s. 29, and sch. ii, art. 148—Limitation.

The mere assertion of an adverse title by a mortgagee in possession does not make his possession adverse, or enable him to abbreviate the period of [656] 60 years which the law allows to a mortgagor to prosecute his right to redeem and seek his remedy by suit. *Sheopal v. Khadim Hossein* (H. C. R., N.-W. P., 1875, p. 220) followed.

Where, accordingly, certain immoveable property was mortgaged in June 1854, for a term which expired in June 1874, and in July 1868, the equity of redemption of such property was transferred by sale to the mortgagees by a person who was not competent to make such

* Second Appeal, No. 258 of 1878, from a decree of Pandit Har Sahai, Subordinate Judge of Farukhabad, dated the 7th December 1877, affirming a decree of Maulvi Wajid Ali, Munsif of Kamganj, dated the 11th September 1877.

transfer, and the mortgagees set up a proprietary title to such property in virtue of the sale, held, in a suit to redeem such property instituted in March 1877, that such suit was not barred because it was not instituted within twelve years from the date of the deed of sale.

THIS was a suit to recover the possession of certain immoveable property by redemption of mortgage. This property originally belonged to one Kali Khan, whose sons, after his death, in June 1854, mortgaged it for 20 years to Lalta Bakhsh and Lakhan Singh. On the 31st July 1863, Munni, Kali Khan's widow, sold the property as her own to the mortgagees, Raghu Nath and Khuman Singh. The suit was instituted on the 19th March 1877, by the heirs of the mortgagees, Raghu Nath and Khuman Singh were made defendants in the suit after its institution, but they did not appear to defend it. The remaining facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which certain of the plaintiffs appealed from the decree of the lower Appellate Court. That decree dismissed the suit of these plaintiffs as barred by limitation. The plaintiffs contended that the suit was within time.

Pandit Nand Lal for the Appellants.

Munshi Hanuman Prasad and Pandit Bishambhar Nath for the Respondents.

The Court delivered the following

Judgment:—The estate of which redemption is sought in this suit belonged to Kali Khan, and had before his death been in mortgage, and in June 1854, was re-mortgaged for a term of 20 years to Lalta Bakhsh and Lakhan Singh, the sons of the former mortgagee, by his sons, Azmat and Niamat. On the 31st July 1863, it was sold to the respondents by his widow, Munni, as her own property, and the sale transaction is said to have been followed by mutation of registry, notwithstanding an objection preferred by the present appellants in the registry department. Shortly before the expiry of [657] the term of the mortgage, his daughter, Imaman, sued to establish her right to a share of the estate as one of the heirs of her father and brothers. On the 18th September 1874, the Court of First Instance passed in her favour a decree which was upheld in special appeal by this Court on the 22nd June 1875. She and other heirs of Azmat and Niamat aforesaid have now joined in this suit for the redemption of the mortgage. Her claim is not disputed, but the claim of the plaintiffs, appellants, is resisted by the defendants, respondents, Lalta Bakhsh and Lakhan Singh, the original mortgagees, on the ground that, as more than twelve years have elapsed between the date of the deed of sale executed by Munni and the date on which the present suit was instituted, their rights have ceased to exist. The defence has been accepted by the lower Courts as a complete and conclusive answer to the suit. The Court of First Instance holds their claim to be barred by the general limitation of twelve years. The lower Appellate Court, concurring, expresses its opinion that, as the plaintiffs, appellants here, did not sue within twelve years from the 31st July 1863, to avoid the sale-deed of that date, the defendants, respondents, must be considered to have been in adverse possession from that date of the property which those plaintiffs claim to redeem as belonging to them.

The suit as brought is simply a suit of the nature described in art. 148, sch. ii of Act IX of 1871. Sixty years is the period of limitation fixed for such a suit. The ruling of the Court below that the suit is barred by limitation is obviously wrong; but of course the suit is liable to be dismissed if the plaintiffs, appellants here, have really lost their rights by reason of not having sued to set aside the sale-deed of the 31st July 1863, within twelve years from that

date. Section 29 of Act IX of 1871 declares that, at the determination of the period limited to any person for instituting a suit for possession of any land, his rights to such land shall be extinguished; but it does not appear that the plaintiffs, appellants, have lost their rights under the operation of this section, inasmuch as the right of redeeming and recovering possession of the landed property in suit only accrued to them in June 1874, on the expiry of the term of mortgage. The possession of Lalta Bakhsh and Lekhan Singh, under the deed of mortgage of June 1854, of the rights conveyed to them thereby was certainly not adverse to the mortgagors of their representatives, who still remained possessed of the equity of redemption, or the right of re-entry on their property after the term of mortgage on repayment of the mortgage debt. It does not appear that the plaintiffs, appellants, were divested of this right by the sale-deed of the 31st July 1863, to which they were not parties. Munni, by whom it was executed, could transfer or surrender her own rights, but was not legally competent to transfer or surrender the rights remaining in the property of the plaintiffs, appellants, and those rights consequently could not pass to her vendees by means of that instrument. How then the possession of the original mortgagees, which was not adverse before the 31st July 1863, became after that date adverse to the plaintiffs, appellants, it is not easy to understand. The possession of a mortgagee does not become adverse whenever a mortgagee chooses to style himself or is styled proprietor of the mortgaged property. One does not see then why the plaintiffs, appellants, were bound to sue for the evidence of what was actually void. The sale-deed by which their rights were illegally disposed of did not practically affect them, for their rights of re-entry by redemption could not practically be enforced until the expiry of the term of mortgage in June 1874, and therefore, although its execution would doubtless have justified them in suing for its avoidance, had they deemed such a precaution expedient, such a proceeding was not necessary or obligatory upon them. They required no immediate relief. Now that they are asserting their right of redeeming the property from those to whom it was mortgaged by persons whom they represent and to whom they have succeeded in title, it is surely for the mortgagees, if they dispute the right in reliance on the deed of sale of the 31st July 1863, to show that it destroyed that right. The mere exhibition of their names as the vendees of the property in the proprietary registers of the Revenue Department cannot create a proprietary title in them: such a title must be proved to have a legal origin. The ruling of the lower Courts is in direct contravention of the Full Bench ruling in *Sheopal v. Khudim Hossein* (H. C. R., N.-W. P., 1875, p. 280), to the effect that the mere assertion of an adverse title will not enable a mortgagee in possession to abbreviate the period of 60 years which the law allows to a mortgagor to prosecute his right to redeem and [659] seek his remedy by suit. There is no evidence that the defendants, Raghu Nath and Khuman Singh, who have not defended the suit, have ever been in possession of the property in suit under the sale-deed of the 31st July 1863. The defence which the lower Courts accepted must be rejected as untenable. Reversing the decree of the lower Court in so far as it dismisses the claim of the plaintiffs, appellants, we decree this appeal and claim with costs in both Courts.

Appeal allowed.

NOTES.

The nature of the possession of the mortgagee cannot be altered by his own act:—32 Cal. 296 P.C. See also 14 Mad. 38; 14 Bom. 279; 21 Bom., 424; 793; 10 Mad. 189; 11 I. C. 429; 853.

Similarly the tenant cannot alter the nature of his possession:—(1902) 25 Mad. 507.]

[1 ALL. 660]

APPELLATE CIVIL.

The 30th April, 1878.

PRESENT:

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND
MR. JUSTICE PEARSON.

Muhammad Ali.....Plaintiff

versus

Kalian Singh.....Defendant.

Suit for profits—Sir land—Ex-proprietor tenant—Rent—Act XVIII of 1873 (North-Western Provinces Rent Act), ss. 7, 14.

A certain mahal, of which the plaintiff in this suit claimed a one-third share of the profits or a certain year, belonged in equal shares to the defendant (lambardar), and *S* and *R*, his two brothers, who held certain sir land in partnership. The plaintiff had acquired the share of *S* by auction-purchase, *S* thus becoming an ex-proprietor tenant. The sir land was not included in the rent-roll of the mahal, but was admitted by the defendant to be assessable with rent at a certain rate per bigha. Held that, whatever might be the course proper to be taken for the purpose of assessing such sir land or *S*'s share of it with rent, and notwithstanding that such course had not been taken, the plaintiff was entitled in this suit to claim and obtain his share in the profits of the sir land.

THIS was a suit under Act XVIII of 1873 for profits. Sultan Singh, Kalian Singh, and Rodra Singh were the owners of a certain mahal in equal shares. They held the sir land appertaining to the mahal, upon which no rent had been assessed, as coparceners in equal shares. Sultan Singh's interest in the mahal had been purchased by the plaintiff in this suit, who now claimed from Kalian Singh, as lambardar, a one-third share of the profits of the mahal for the year 1283 Fasli. In determining what was due to the plaintiff the Court of First Instance held that the plaintiff was entitled to a one-third share of the rent assessable upon the sir land. [660] This land the defendant admitted to be assessable with rent at the rate of five rupees per bigha, and the Court accordingly allowed the plaintiff one-third of the assessable rent less four annas in the rupee, a deduction which it made, with reference to s. 7 of Act XVIII of 1873, in view of the fact that Sultan Singh was an ex-proprietor. On appeal by the defendant the lower Appellate Court held that, as the sir land had not been assessed under s. 14 of Act XVIII of 1873, no allowance could be made to the plaintiff on account of it in determining the profits due to him.

The plaintiff appealed to the High Court.

Munshi Hanuman Prasad and Shah Asad Ali for the Appellant.

The Junior Government Pleader (Babu Dwarka Nath Banarsi) for the Respondent.

The Judgment of the Court was delivered by

* Second Appeal, No. 192 of 1878, from a decree of S. Melville, Esq., Judge of Meerut, dated the 1st December 1877, modifying a decree of M. S. Howell, Esq., Assistant Collector of Bulandshahr, dated the 25th April 1877.

Pearson, J.—It appears that the mahal of which the plaintiff claims one share of the profits of 1283 Fasli belonged in equal shares to the defendant and his two brothers, who held 159 bighas and 9 biswas of land as *sir* in partnership. The plaintiff recently acquired the share of one of the brothers by name Sultan Singh by purchase at auction. The *sir* land is not included in the rent roll, but is admitted by the defendant to be assessable at five rupees per bigha. The Court of First Instance considered the plaintiff to be entitled to a third of the assessable rent, after making the deduction of four annas per bigha required by s. 7 of Act XVIII of 1873 in favour of an ex-proprietary tenant. The lower Appellate Court has ruled that he is not entitled to claim a share of the profits from the *sir* land aforesaid, because it has not been assessed with rent under s. 14 of the Act above-mentioned. The special appeal calls in question the correctness of the ruling. The section on which it purports to be based provides for the enhancement or determination of the rent of an ex-proprietary tenant. How it would possibly be applied in a case like the present in which Sultan Singh has no separate holding but holds jointly with his brothers the *sir* land aforesaid, it is not now necessary to discuss. There is some show of reason in the appellant's contention that, if action in the matter should be taken under the section, it ought to be taken by the defendant who is the lambardar of the mahal. [661] But whatever may be the course proper to be taken for the purpose of assessing the *sir* land or Sultan Singh's share of it with rent, we are not prepared to admit that, because such course had not been taken, the plaintiff is debarred from claiming and obtaining his fair share in the profits of the *sir*-holding. To this he seems entitled in reason and equity, and we decree the appeal with costs, reversing the lower Appellate Court's decree and restoring that of the Court of First Instance.

Appeal allowed.

[1 All. 661]

APPELLATE CIVIL.

The 9th April, 1878.

PRESENT :

MR. JUSTICE PEARSON, AND MR. JUSTICE OLDFIELD.

Phukar Singh and others.....Plaintiffs

versus

Ranjit Singh and others.....Defendants.

Hindu Law—Mitakshara—Inheritance—Stridhan.

Immoveable property inherited by the paternal grandmother from the grandson does not rank as *stridhan* and on her death devolve as such on her heirs, but devolves on her death on the heirs of the grandson.

* Second Appeal, No. 151 of 1878, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 26th January 1878, reversing a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 19th April 1877.

THIS was a suit for the possession of certain immoveable property, being the estate of one Sardar Singh, who died on the 25th October 1861, without leaving any issue. His paternal grandmother, Muna Kuár, succeeded to his estate in the absence of nearer heirs. She died on the 30th September 1873. This suit was instituted on the 14th July 1876, in which the plaintiffs claimed as heirs of Sardar Singh. The lower Appellate Court reversed the decree which the Court of First Instance gave the plaintiffs, and dismissed the suit on the ground that it was barred by limitation. The plaintiffs appealed against the decree of the lower Appellate Court to the High Court. The remaining facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. Chatterji and Pandits *Bishambhar Nath* and *Ajudhia Nath* for the Appellants.

[662] The Senior Government Pleader (*Lala Juala Prasad*), the Junior Government Pleader (*Babu Dwarka Nath Banarji*), and *Munshi Sukh Ram* for the Respondents.

The Judgment of the Court was delivered by

Oldfield, J.—The property in suit belonged to Sardar Singh, and at his death he was succeeded in 1861 by his paternal grandmother, Muna Kuár, in the absence of nearer heirs. She died in 1873, leaving a daughter, Phul Kuár, still living. Some of the defendants are her sons, and the defendant, Ranjit Singh, is a son of a sister of Sardar Singh also living. The plaintiffs are grandsons of the full brother of Mohabbat Singh, great-grandfather of Sardar Singh, and they claim the estate as heirs of Sardar Singh. Another plaintiff, Ganjam Singh, has purchased part of their rights and interests. The Judge has dismissed the suit and reversed the decree of the first Court. The plaintiffs have preferred a special appeal. It is clear that Muna Kuár succeeded Sardar Singh in the ordinary course of succession, and her possession has not been adverse to the plaintiffs, to whom the succession only opened out at her death. There is therefore no bar by limitation, as the Judge appears to think; but it has been contended before us that the Judge's decree should be maintained on the ground that Muna Kuár succeeded to the property as *stridhan*, and that the plaintiffs would not be her heirs, but her daughter, Phul Kuár, for whom the defendants hold.

The question we have to determine is whether property inherited by the paternal grandmother from the grandson will rank as *stridhan* and devolve as such; and, to support the affirmative, *Mitakshara*, ch. ii, s. xi, v. 2, is referred to, where property which a woman has acquired by inheritance is included in the category of "woman's property;" and Sir T. Strange has included this sort of property in the several kinds of *stridhan*—Strange's Hindu Law, 4th ed., p. 28. But on this subject Sir W. Macnaghten observes: "In the *Mitakshara*, whatever a woman may have acquired, whether by inheritance, purchase, partition, seizure or finding, is denominated woman's property, but it does not constitute her *peculum*"—Macnaghten's Hindu Law, 3rd ed., p. 38; and this distinction between woman's property generally and *stridhan* proper, which alone **[663]** devolves on her relations, was noticed by the Privy Council in *Thakoor Deyhee v. Baluk Ram* (11 Moore's Ind. App. 139) at the time that they decided that one class of inherited property, viz., that inherited by a widow from her husband, does not rank as *stridhan* devolving on her heirs. The enumeration in Manu of woman's property has been held not to be exhaustive, and it is unnecessary for us in this suit to give an opinion as to what extent property

acquired by inheritance will be *stridhan*. The question was discussed by the Privy Council in *Brij Inder Bahadur Singh v. Rane Janki Koer* (L. R. 5 Ind. App. 1), and left undetermined, but we are disposed to hold that property inherited by the paternal grandmother from her grandson is not *stridhan*. It may be gathered from the text-books on the Hindu Law that property must be held unconditionally, and subject to no restrictions, to constitute *stridhan* devolving on a woman's heirs. "That alone is her peculiar property which she has power to give, will, or use independently of her husband's control" —*Dayabhaga*, ch. iv, s. i, v. 18. The property inherited by the grandmother from the grandson will not bear this test, since it is like property inherited by the mother from the son, subject to the same restrictions as to its disposal as that inherited by the wife from her husband. It has been held that the rules concerning property devolving on the widow equally affect property devolving on a mother from her son—note to *Bijju Dibeh v. Unpoorna Dibeh* (S. D. A., Rep. vol. i, 164)—and it has already been decided by the Privy Council—*Thakoor Deyhee v. Baluk Ram* (11 Moore's Ind. App. 139) and *Bhugwandeep Doobey v. Myra Baee* (11 Moore's Ind. App. 487)—that property inherited from the husband by the widow will not rank as *stridhan*, and the ground on which that decision rests appears to us to apply equally to the case before us. This is the view of the law of succession taken by Sir T. Strange and Sir W. Macnaghten.—"Had the property been the mother's, in the Hindu sense of 'woman's property,' it would descend on her death to her daughters, but having been inherited by her from her son, it passes according to the law as practised in Bengal, not to her heirs, but to his,"—Strange's Hindu Law, 4th ed., p. 144. "On her death (*i.e.*, mother's) the property devolves on the heirs of the son, and not on her heirs."—Macnaghten's Hindu Law, 3rd ed., [664] p. 26; and the rulings of the Courts accord with this view,² though there appears some conflict of decisions in the Bombay High Court. We decree the appeal with costs, and reverse the decree of the lower Appellate Court, and restore that of the Court of First Instance.

Appeal allowed.

NOTES.

[The same rule applies also to *stridhan* *inherited*: (1903) 25 All., 468; (1909) 92 All., 253.]

²See *P. Bachirjee v. V. Venkatappudu*, 2 Mad. H. C. Rep. 402; *Vinayak Anandrar v. Lakshminibai*, 1 Bom. H. C. Rep. 117; *Pranjirandas Tulsidas v. Derkurarbai*, 1 Bom. H. C. Rep. 190; and *Narsappa Lingappa v. Sakharam Krishna*, 6 Bom. H. C. Rep. A. C. J. 215.

[1 ALL. 665]

APPELLATE CRIMINAL.

The 6th May, 1878.

PRESENT :

MR. JUSTICE TURNER, OFFICIATING CHIEF JUSTICE.

Empress of India
versus
 Bhawani and another.

Confession made by one of several persons being tried jointly for the same offence—Act I of 1872 (Evidence Act), s. 30 - Conviction on uncorroborated confession.

A conviction of a person who is being tried together with other persons for the same offence cannot proceed merely on an uncorroborated statement in the confession of one of such other persons.*

CERTAIN persons were tried by Mr. J. S. Porter, Deputy Commissioner of Jhansi, on a charge of dakaiti. Eleven of these persons were residents of the same village. Certain of those eleven persons, including persons named severally Baij Nath, Damru, and Gandharp, who had made confessions, pleaded guilty to the charge. The remainder, of whom two were named respectively Bhawani and Pheran, pleaded not guilty. The Deputy Commissioner, on the 18th January 1878, convicted Pheran and Bhawani on the confessions of Baij Nath, Damru, and Gandharp; the portion of his judgment [665] relating to these two accused being as follows : "Pheran and Bhawani are sons to Moji, the lambardar of Purenia. The evidence against them is the statements of the other dacoits. Baij Nath states that Bhawani carried a gun. According to Damru, it was Pheran, Puna, and Garna, with whom he settled preliminaries when he went to Purenia. Gandharp himself names Pheran. Manu, *ghosi* of Semri, is not likely to implicate Bhawani and Pheran falsely, *ghosis* like himself. In defence Pheran sets up an *alibi*. The witness he calls, Ghobinda, Kuchi, however, contradicts him on every point. Bhawani calls two

*As to the necessity of corroboration, see Queen v. Chunder Bhattacharjee, 24 W. R., Cr. 42 ; Queen v. Naya, 28 W. R., Cr. 24 ; Queen v. Sadhu Mundul, 21 W. R., Cr. 69 ; Queen v. Jaffir Ali, 19 W. R., Cr. 57 ; I. L. R. 1 Mad. 163.

The Calcutta High Court appear to have decided, under a series of rulings, that the statement of a person being tried jointly with other persons cannot be used in evidence against such other persons, unless such statement implicates himself as well as such other persons and to the same extent. See Queen v. Baijoo Choudhree, 25 W. R., Cr. 48 ; Queen v. Keshub Bhoomia, 25 W. R., Cr. 8 ; Queen v. Bilat Ali, 10 B. L. R., 458, S.C., 19 W. R., 67 ; Queen v. Mohesh Biswas, 10 B. L. R., 455, note ; S.C., 19 W. R., 16. See also Reg. v. Amrita Gorinda, 10 Bom. H. C. Rep., 497.

It has also been ruled that such statement cannot be used as corroborating the evidence of an accomplice—Queen v. Jaffir Ali, 19 W. R., Cr. 57 ; Reg. v. Malapabin Kapona, 11 Bom. H. C. Rep., 196. Also that such a statement cannot be used in evidence, where one party is being tried for the abetment of the offence for which the other is on his trial—Queen v. Jaffir Ali, 19 W. R., Cr. 57. See also Reg. v. Amrita Gorinda, 10 Bom. H. C. Rep. 497.

Also that such a statement cannot be used in evidence after the person making it has been convicted and sentenced—Reg. v. Kalu Patil, 11 Bom. H. C. Rep., 146.

witnesses who gave him a good character and state he is a man of some substance. There can be no doubt that both men were in the dacoiti, and they at least were not forced by want to join in it. Pheran, however, is a very young man." Bhawani was sentenced to seven years' rigorous imprisonment, Pheran to five years. These sentences were affirmed by the Commissioner of Jhansi.

Bhawani and Pheran appealed to the High Court.

Pandit Anandi Lal for the Appellants.

The Junior Government Pleader (Babu Dwarka Nath Banarji) for the Crown.

Turner, Offg. C. J.—It is to be regretted that, in a case of this magnitude, no evidence was obtained by inquiry to support the charge against the accused. Had none of them confessed, not one of them could have been convicted. But where the Police inquiry (if indeed there was one) so completely fails, it was competent to the Deputy Commissioner to have tendered a pardon to such of the accused as he considered where the least guilty, and then to have obtained some evidence better than the mere statements of accused persons to bring to justice those whom he regarded as the most influential among the accused. Although the law allows a Court to consider statements made by accused persons when dealing with the case against other accused persons who are tried with them, I know of no instance in which on such evidence only a conviction has been affirmed, and I should hesitate to establish a precedent. It appears to me that if, as has been established by experience, the evidence of an approver examined on oath and liable to cross-examination ordinarily should not be accepted without corroboration on a material point, *a fortiori* such [666] corroboration should be required to support the statement of a person naturally desirous of earning the favour of the Court in the hope of a lenient sentence, who makes a statement which does not expose him to the penalties of perjury, and who cannot be cross-examined by the other accused in turn. There existing against the appellants no other evidence than such statements, I do not consider them by themselves sufficient to place the guilt of the appellants beyond reasonable doubt, and I therefore acquit them.

Convictions quashed.

NOTES.

[See 1 All. 675.]

[1 AIL. 686]

CRIMINAL JURISDICTION.

The 20th May, 1878.

PRESENT :

MR. JUSTICE SPANKIE.

Empress of India

versus

Partab.

Punishment—Whipping—Act VI of 1864, ss. 2, 3—Act XLV of 1860 (Penal Code), ss. 378, 411—Theft—Dishonestly receiving stolen property—Act X of 1872 (Criminal Procedure Code), ss. 504, 505—Security for good behaviour.

P was convicted by a Magistrate of the first class of dishonestly receiving stolen property. He confessed on his trial that he had twice previously been convicted of theft. He was sentenced to be whipped, to be rigorously imprisoned, and, on the expiration of the term of imprisonment, to furnish security for good behaviour. *Held* that, the offence of theft not being the same offence as that of dishonestly receiving stolen property, the punishment of whipping was illegal.

Held also, with some hesitation, that there was evidence as to general character adduced before the Magistrate which justified him in dealing with *P* under s. 505 * of Act X of 1872.

Held also, that the order requiring security should not have formed part of the sentence for the offence of which *P* was convicted. A proceeding should have been drawn out representing that the Magistrate was satisfied, from the evidence as to general character adduced before him in the case, that *P* was by repute an offender within the terms of s. 505 of Act X of 1872, and therefore security would be required from him, and an order should have been recorded to the effect that, on the expiry of the imprisonment, *P* should be brought up for the purpose of being bound.†

ONE Partab was convicted on the 1st February 1878, by Mr. L. S. Porter, Assistant Magistrate of the first class, under s. 411 [687] of the Indian Penal Code, of dishonestly receiving stolen property. He admitted on his trial that he had twice previously been convicted of theft. The sentence passed on him was as follows:—"The sentence of the Court upon the prisoner is that he receive thirty stripes and be kept in rigorous imprisonment for the space of two years, including three months' solitary confinement; and the Court further directs that, on the expiration of this term of two years, the accused Partab shall furnish security, himself in Rs. 100, with two sureties of Rs. 100 each, to be of good behaviour for the further term of one year. In

* [Sec. 505 :—Whenever it appears to such Magistrate, from the evidence as to general character adduced before him, that any person is by repute a

When Magistrate may require security for good behaviour for one year. livelihood, or is a dangerous character, such Magistrate may require similar security for the good behaviour of such person for a period not exceeding one year.]

† See also *Queen v. Shona Dagee*, 24 W. R. Cr. 14, where it was held that when a conviction of an offence is contemporaneous with an order for taking security for good behaviour, ss. 504—506 of Act X, 1872, contemplate that the sentence for the offence shall first be carried out and the person to be bound shall then be brought up for the purpose of being bound.

default of furnishing such security, he shall be kept in rigorous imprisonment for such further term of one year."

Partab applied to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872, contending that the sentence of whipping was illegal, inasmuch as he had previously been convicted of theft, a different offence from the offence of dishonestly receiving stolen property; and that the order requiring security from him was also illegal, as there had been no proceedings under s. 505 of Act X of 1872, and, irrespective of the proceedings in which he had been convicted, there was no evidence as to his general character as would justify the Magistrate in dealing with him under that section.

Mr. Niblett for the Petitioner.

Spankie, J.—The whipping in this case might have been awarded *in lieu* of the punishment to which the accused was liable under s. 411, and if previously convicted of an offence under this section, he might have been punished with whipping *in lieu of or in addition to* any other for which he would have been liable for the offence. But there is no record of the previous convictions of accused. He does not admit that he was twice before punished for a similar offence to that with which he was now charged. He stated that he had been twice punished for theft, but the offence of theft is not the same offence as that of dishonestly receiving stolen property, knowing the same to have been stolen. Whipping therefore should not have been added as a punishment, and that portion of the sentence is annulled.

[668] In making an order for security for good behaviour I presume that the Magistrate holds the powers of a first class Magistrate, and that he was acting under s. 505 of the Criminal Procedure Code. I have some doubt whether the Magistrate had adduced before him such *evidence as to general character* as to justify his dealing with the accused as a person known by repute to be a thief or receiver of stolen property. He had already sentenced the accused for the offence of which he was found guilty, and in the record of the trial I find no evidence from which it could be gathered that the accused was by repute a receiver of stolen property. But the prisoner certainly allowed that he had been punished twice for theft, and here he was again tried and found guilty of receiving stolen property. I am therefore unwilling to disturb the order. But the order should be no part of the sentence for the offence of which accused was convicted. There should have been a proceeding drawn out representing that the Magistrate from the evidence as to general character adduced before him in this case, was satisfied that Partab was by repute an offender within the terms of s. 505 of the Criminal Procedure Code, and therefore security would be required from him. But as he had been sentenced to two years' rigorous imprisonment, which term has not expired, an order should have been recorded to the effect that, on the expiration of the term, the prisoner should be brought up for the purpose of being bound (cl. 2, s. 504).

NOTES.

[See 9 Cal. 215.]

[1 ALL., 669]

FULL BENCH.

The 27th May, 1878.

PRESENT:

MR. JUSTICE TURNER, OFFICIATING CHIEF JUSTICE, MR. JUSTICE PEARSON,
 MR. JUSTICE SPANKIE, AND MR. JUSTICE OLDFIELD.

Thakur Prasad.....Decree-holder

versus

Ahsan Ali and another.....Judgment-debtors.*

Execution of decree—Appeal—Act VIII of 1859 (Civil Procedure Code)—Act X of 1877 (Civil Procedure Code)—Repeal—Pending Proceedings—Act I of 1868 (General Clauses Act), s. 6.

The holder of a decree for money applied for the attachment in the execution of the decree of certain moneys deposited in Court to the credit of the judgment-[669] debtor. On the 4th June 1877, the Court of First Instance refused the attachment on the ground that the decree directed the sale of certain immoveable property for its satisfaction, and awarded no other relief. The order of the Court of First Instance was affirmed by the lower Appellate Court on the 4th August 1877. Act X of 1877, repealing Act VIII of 1859 and Act XXIII of 1861, came into force on the 1st October 1877. On the 13th November 1877, the decree-holder applied to the High Court for the admission of a second appeal from the order of the lower Appellate Court on the ground that the decree had been misconstrued.

Held, that an appeal was admissible under the repealed Act VIII of 1859, under the provisions of s. 6 † of Act I of 1868.

Held also, that the order of the lower Appellate Court was also appealable under Act X of 1877.

THIS was a reference to the Full Bench by TURNER, J. The circumstances under which this reference was made and the questions referred are stated in the judgment of TURNER, SPANKIE, and OLDFIELD, JJ., concurring.

Pandit Anandi Lal for the Petitioner.

Munshi Kashi Parsad and Shah Asad Ali for the Opposite Parties.

Turner, Offg. C. J. (and SPANKIE and OLDFIELD, JJ., *concurring*).—In the case in which this application is presented, the decree-holder applied for execution of his decree by the attachment of moneys deposited in the Court to the credit of the judgment-debtor. On the 4th June 1877, the Court of First Instance refused attachment on the ground that the decree directed the sale of certain immoveable property for the satisfaction of the sum decreed, and awarded no other relief. The order of the Court of First Instance was affirmed by the lower Appellate Court on the 4th August 1877. The new Code of Civil Procedure came into operation on the 1st October 1877. On the 13th November

* Miscellaneous Second Appeal, No. 27 of 1878, from an order of H. D. Willock, Esq., Judge of Azamgarh, dated the 4th August 1877, affirming an order of Maulvi Muhammad Husain Khan, Munsif of Azamgarh, dated the 4th June 1877.

Matters done under an [†] [Sec. 6 :—The repeal of any Statute, Act, or Regulation, enactment before its repeal shall not affect anything done or any offence committed, or any fine or penalty incurred, or any proceedings commenced before the repealing Act shall have come into operation.]

1877, the decree-holder applied for the admission of a special appeal from the order of the lower Appellate Court on the ground that the decree had been misconstrued. The Judge to whom the application was made referred it to the Full Bench. Two questions are raised in this reference : whether the application is governed by the provisions of the repealed Code of Civil Procedure or by those of the existing Code ; and if by those of the existing Code, whether the second appeal lies from the order of the lower Appellate Court.

[670] The 3rd section of the Code now in force, Act X of 1877, declares that the enactments mentioned in the second schedule in that Act (which includes so much of Acts VIII of 1859 and XXIII of 1861 as had not been theretofore repealed) were thereby repealed, subject to the proviso that nothing in that section contained should affect the procedure prior to decree in any suit instituted or any appeal presented before that Code came into force. The proviso does not go on to exclude in express terms the operation of the General Clauses Act, but by implication it does exclude the operation of the 6th section of that Act in respect of the procedure after decree in suits or appeals. While then it is not denied that proceedings in execution of decree initiated after the existing Code came into operation must be governed by the provisions of that Code, the question remains whether such proceedings initiated before the Act came into operation are affected by that law, so that thereafter they must be governed by it, or whether they are not to be prosecuted and brought to a conclusion as if the law under which they were instituted were still in force. By the 6th section of the General Clauses Act it was enacted that the repeal of any Act should not affect any proceedings commenced before the repealing Act shall have come into operation.

That the provisions of s. 6 of the General Clauses Act operate on proceedings in execution of decree has been already held by the High Court of Bombay (*In the matter of the petition of Ratansi Katanji*, I. L. R., 2 Bom. 148), and we agree with the opinion expressed by the learned Chief Justice, Sir MICHAEL WESTROPP, that the chapter of the Code which deals with execution of decree is prospective and does not affect proceedings already commenced. We may refer to several sections in support of the view. Section 311 empowers the decree-holder or any person whose property has been sold *under that chapter* to take objection to the sale on the ground of a material irregularity in publishing or conducting it, but it makes no reference to sales which have taken place under the repealed Code, though the period allowed for such objections under that Code might not have expired when Act X of 1877 came into operation. Section 312 declares orders passed under the preceding section final, but it does not refer to similar orders **[671]** passed under the repealed Code. Section 283 declares any party affected by an order passed under ss. 280, 281, 282 entitled to institute a suit to establish his right to the property in dispute, but it is silent as to similar orders passed under the provisions of the repealed Code. Lastly s. 588 declares that an appeal shall lie from certain orders "under this Code." Among the orders specified as appealable are some which would be passed after decree, and which, if passed under the repealed Code, would under that Code have been appealable. It is not unreasonable then to conclude that, in abstaining from making provision for cases arising under the repealed Code in the instances to which we have alluded, and in giving prospective effect to the chapter relating to execution of decrees, the Legislature had in view the provisions of the General Clauses Act.

However this may be, unless the 6th section of the General Clauses Act is excluded by the Code, and, as we shall presently show, it is not in our judgment excluded, in respect of proceedings in execution, it cannot be disregarded, and

its effect is to leave such proceedings initiated before the repealing Act came into force to be dealt with under the provisions of the repealed Code. For the position that the saving of "proceedings commenced" from the operation of a repealing Act extends also to appeals from such proceedings we find authority in *Ratanchand Srichand v. Hanmantrav Shirbakas* (6 Bom H. C. Rep. A. C. J., 166). An appeal is in fact a stage of a proceeding, and if, as it might happen, the right of appeal was taken away by a repealing Act, and a proceeding theretofore appealable converted into a final proceeding, it cannot be doubted that the proceeding would be affected by the alteration of the law. If in such a case it be intended to deprive the parties of the right of appeal, the intention to exclude the operation of s. 6 of the General Clauses Act should appear clearly in the repealing Act.

For the reasons we have stated we arrive at the conclusion that proceedings in execution of decrees instituted under Act VIII of 1859 are to be governed by the provisions of that Code, and that an appeal should be entertained from all orders passed in such proceedings which under the provisions of that Act were appealable. [672] But it has been suggested that, inasmuch as by s. 647, Act X of 1877, the procedure in that Act prescribed is to be followed, so far as it can be made applicable in all proceedings other than suits and appeals, the provisions of the last paragraph of s. 3 declaring that nothing in the Act contained shall affect the procedure prior to decree in any suit instituted, etc., apply also to proceedings in execution, so that the procedure in such proceedings (whether instituted before the passing of the Act or not) subsequently to the formal order of the Court wherein the result of the proceeding is embodied is governed by the provisions of Act X of 1877.

That proceedings in execution of decree are among the proceedings other than suits or appeals to which s. 647 applies may be admitted. The Code, following the usage in this country, does not treat appeals as mere stages in a suit; and similarly, under Act VIII of 1859, proceedings in execution of decree have in accordance with the same usage been treated, not as stages in a suit, but as miscellaneous proceedings. The provisions of the analogous section in the former law, s. 38, Act XXIII of 1861, were held by this Court applicable to proceedings in execution of decree, on the same ground on which it must be held that the provisions of s. 647 are applicable to such proceedings, namely, that otherwise no procedure is provided for such proceedings. It does not, however, follow from the admission that the provisions of s. 647 are applicable to proceedings in execution of decree, that we must be compelled to the conclusion that the last paragraph of s. 3 is also applicable to the proceedings, or to all the proceedings, to which s. 647 applies. While had such been the intention of the Legislature, it could have been made to appear clearly by the introduction of a few words in s. 3, we find cogent evidence to the contrary in the prospective character of the sections relating to execution of decree to which we have already adverted. We would then reply that the last paragraph of s. 3 is not to be extended to proceedings in execution of decree. Should, however, our opinion on this point be erroneous, it would be necessary to consider what are the orders passed in execution of decree referred to in s. 588, cl. (j),¹ and

* *In the matter of the petition of Harshankar Parshad*, I. L. R., 1 All., 178. See also *Gaya Parshad v. Bhup Singh*, I. L. R., 1 All., 180.

Orders appealable.

+ [Sec. 588 :—An appeal shall lie from the following orders under this Code and from no other such orders :—

(j) orders under Section 244, as to questions relating to the execution of decrees, of the same nature with appealable orders made in the course of a suit.

whether other orders passed in execution of decree are appealable under the Code [673] save such as are referred to in s. 588, cl. (j); and inasmuch as these questions are necessarily raised in a number of references which are now before the Court arising out of proceedings instituted after the Act came into operation, it will be convenient to dispose of them on the reference now before us. By the provisions of the first paragraph of s. 588 read with cl. (j) appeals are allowed from orders under s. 244 as to questions relating to the execution of decrees of the same nature with appealable orders made in the course of a suit. The first observation that arises on this section is that, if, as we have held, the provisions of s. 647 apply to proceedings in execution of decree, cl. (j) is unnecessary, unless it was intended to restrain the larger right of appeal than would be given by s. 647. Yet unless we import a limitation which the terms do not warrant, the clause declares no more than is implied in s. 647, for, under s. 647 the procedure prescribed by the Act is to be followed in proceedings other than suits, and consequently the orders passed in such proceedings would be open to appeal when of the same nature as appealable orders made in the course of a suit. It is then argued that the term "orders" made in the course of a suit is to be restricted to orders passed in the course of a suit prior to decree, and that, inasmuch as the Code distinguishes between appeals from orders and appeals from decrees, the Court is constrained by the declaration that an appeal shall lie from those orders and no other such orders, to hold that no orders passed under s. 244 are open to appeal save such as are of the same nature with appealable orders passed in the course of a suit prior to decree.

On referring to s. 244, it will be seen that all the questions therein mentioned are to be determined by the "order" of the Court. They embrace not only the minor questions which may arise prior to determination of a proceeding, but the determination of a proceeding itself, which may be a matter of the utmost importance to the parties. It is scarcely to be supposed that no appeal would be provided from such orders, while an appeal is given from interlocutory orders of comparatively minor importance.

Again, orders passed after decree as well as orders passed before decree may be properly termed orders passed in the course of a suit, and indeed the decree itself is in one sense an order, [674] and is so defined in the Code. By adopting the construction which has been urged, we import a limitation which, as we have said, the terms of the clause do not warrant. We are then compelled to the conclusion that the provisions of s. 588 do not embrace all the directions on the determination of proceedings which are termed in the Code "orders," and that, in declaring that an appeal should lie from the orders therein mentioned and from no other such orders, we must understand orders of a similar nature to those specified, and not to all "orders" that might be passed under the Code. The expression "orders" under s. 244 as to questions relating to execution of decree of a similar nature to appealable orders made in the course of a suit would be awkward if it were intended to apply to orders determining such questions; and again orders made in the course of a suit may fairly be understood as not embracing the order which is also the decree. While then the provisions of cl. (j) allow an appeal from the orders made in the course of execution proceedings where an appeal is allowed from similar orders passed in the course of a suit, the provisions of s. 647 declare that the procedure prescribed by the Act shall be followed (so far as it is applicable) in all proceedings other than suits and appeals. It follows that an appeal will lie in such proceedings from the order which is analogous to a decree in a suit.

The definition of the term "decree" supports the conclusion at which we have arrived. "A 'decree' means the formal order of the Court in which the

result of the decision of the suit or *other judicial proceeding* is embodied." Applying this definition to proceedings in execution of decree, we feel ourselves at liberty to hold that the formal order of the Court in which the result of the proceeding is embodied is a decree within the meaning of that term in the Code. It is therefore appealable in all cases in which a decree is appealable, and the procedure must in such cases be governed by the provisions of the chapters which relate to appeals from decrees.

It is true that the definition of the term "decree" is so large as to embrace some of the orders which are appealable under s. 588, but we are not on that account at liberty to reject it. It is also true, as we have shown, that cl. (j) is, on our construction of s. 647, superfluous, but the clause does not appear in any draft of the [675] Code submitted to the Council save the last Bill, No. 5, and it may be that the effect of s. 647 escaped attention.

We reply to this reference that the application is governed by the provisions of the repealed Code, but that, if it be governed by Act X of 1877, an appeal would lie from the order.

Pearson, J. - The appealed order falling within the definition of a decree contained in s. 2 of Act X of 1877, is, in my opinion, appealable under s. 584 of that Act.

The appeal appears to be admissible also under the repealed Act VIII of 1859, under the provisions of s. 6 of Act I of 1868.

NOTES.

[This subject is dealt with *in extenso* in the Notes to 3 Cal. 662 in the Law Reports Reprints. See also 1 All. 745; 748; 2 All. 74; 91; 18 Cal. 86; 16 Cal. 267; 12 Bom. 449.]

[1 All. 678]

APPELLATE CRIMINAL.

The 28th May, 1878.

PRESENT:

MR. JUSTICE PEARSON.

Empress of India

versus

Ram Chand.

Confession made by one of several persons being tried jointly for the same offence—Act I of 1872 (Evidence Act), s. 30—Conviction on uncorroborated confession.

A conviction of a person, who is being tried together with other persons for the same offence, cannot proceed merely on an uncorroborated statement in the confession of one of such other persons (see *Empress v. Bhawani*, *ante* p. 664 and note to that case).

THIS case is not reported in detail, as PEARSON, J., took in it the same view as TURNER, J., in *Empress v. Bhawani* (*ante* p. 664 and note to that case).

Conviction quashed.

[*q. v. supra* 1 All., 609.]

[1 ALL. 675]

APPELLATE CIVIL.

The 3rd June, 1878.

PRESENT :

MR. JUSTICE PEARSON, MR. JUSTICE SPANKIE, AND MR. JUSTICE OLDFIELD.

Behari Lal.....Decree-holder

versus

Salik Ram.....Judgment-debtor.^{*}

Execution of decree—Act VIII of 1859 (Civil Procedure Code), ss. 212, 216—Limitation—Application to enforce or keep in force a decree—Act IX of 1871 (Limitation Act), sch. ii, art. 167.

On the 3rd March 1875, an application was made by a decree-holder to the Court executing the decree which did not, as required by s. 212 of Act, VIII of 1859, state the mode in which the assistance of the Court was required, whether by the arrest and imprisonment of the judgment-debtor or attachment of his property, but prayed that the Court would, under s. 216 of that Act, issue a notice to the judgment-debtor to show cause why the decree should not be executed against him. Under this application, notice was issued to the judgment-debtor on the 28th March 1875. On the 27th April 1875, the execution case was struck off the file on the ground that the decree-holder did not desire further proceedings to be taken. Held, per PEARSON and OLDFIELD, JJ., that for the purposes of art. 167, sch. ii of Act IX of 1871, the application was one to enforce or keep in force the decree and further that limitation should be computed from the date the notice to the judgment-debtor was issued.

Franks v. Nuneh Mal (H. C. R., N.-W. P., 1875, p. 79) impugned.

Per SPANKIE, J., contra.

APPLICATION for the execution of a decree for money by the attachment and sale of certain property was made on the 9th December 1872. The attachment was made and a sale of the property took place, and a portion of the money due under the decree was realised. On the 24th February 1873, the execution case was struck off the file. On the 3rd March 1875, the decree-holder again made an application relating to the decree. This application contained in a tabular form the particulars required by s. 212 of Act VIII of 1859, with the exception of the mode in which the assistance of the Court was required, viz., whether by the arrest and imprisonment of the judgment-debtors or the attachment of their property. In the application the decree-holder prayed that notices might be issued to the judgment-debtors under s. 216 of the Act. The Court made an order on the 20th March 1875, directing notices to issue, and notices

* Miscellaneous Second Appeal, No. 73 of 1877, from an order of R. Saunders, Esq., Judge of Furukhabad, dated the 14th July 1877, reversing an order of Pandit Har Sahai, Subordinate Judge, dated the 5th June 1877.

† See also *Chander Coomar Roy v. Bhogobutty Prosonno Roy*, I. L. R., 3 Cal., 285 and *Jamma Das v. Lalitaram*, I.L.R., 2 Bon., 294; from which cases it appears that the "application" spoken of in art. 167, cl. 4, sch. ii of Act IX of 1871 need not necessarily be an application under s. 212 of Act VIII of 1859, but includes any application to keep in force the decree. See also *Husain Bukhsh v. Maudje*, I. L. R., 1 All., 525.

were issued on the 28th March. On the 27th April 1875, the execution case was struck off the file on the ground that the decree-holder did not desire further proceedings to be taken. On the 30th April 1877, the decree-holder applied for the execution of the decree by the arrest and imprisonment of Salik Ram, one of the judgment-debtors. The judgment-debtor objected that this application was barred by limitation. The Court of First Instance held that the application was not barred by limitation, as it was made within three years from the 28th March 1875, when notices issued to the judgment-debtors. On appeal by the judgment-[677]debtor the lower Appellate Court held that the application was barred by limitation, on the ground that the application made on the 3rd March 1875, was informal, and consequently did not keep the decree in force. The lower Appellate Court relied on *Franks v. Nuneh Mal* (H. C. R., N.-W. P., 1875, p. 79) and Misc. S. A., No. 60 of 1876, dated the 14th December 1876 (*see* next page, note 2).

The decree-holder appealed to the High Court, contending that the present application was within time, as that made on the 3rd March 1875 was sufficient to keep the decree in force.

Munshi *Hanuman Prasad* and Shah *Isad Ali* for the Appellant.

Lala *Har Kishen Das* for the Respondent.

The following **Judgments** were delivered by the Court (PEARSON and SPANKIE, J.J.):-

Pearson, J. The precedent to which the Judge refers supports his decision. But I am not myself able to assent altogether to the ruling in the precedent. In the first place, I doubt whether the notice issued by the Court can be regarded as good for nothing and a mere nullity, because it was issued on the strength of an application not strictly in the form and of the nature prescribed by s. 212 of Act VIII of 1859. Probably the Court should have rejected the application for the issue of a notice and required an application of the kind required in s. 212 specifying the particular relief sought, although no relief could be granted until the notice had been issued, and the omission might have been supplied afterwards. But it did, upon the application presented to it, issue a notice, and art. 167, sch. ii of Act IX of 1871, allows an application to be made for the execution of a decree in cases where a notice under s. 216 of the Code of Civil Procedure has been issued within three years from the date of issuing such notice. In the next place I conceive that the application for the issue of a notice under s. 216, though not an application on which such a notice could properly issue, was still an application to keep in force the decree. The Procedure Code, it is true, provides only for application for the execution of decrees under s. 212, but the limitation law recognises applications having for their object to keep decrees in force. An application which [678] might be irregular in reference to s. 212 might still be an application of the other kind, and I cannot conceive that the decree-holder had any other object in view in making his application of the 3rd March 1875, than to keep the decree in force by warning the judgment-debtor that its enforcement was contemplated. The present application is within three years from that date. I am therefore disposed to uphold the order of the Court of First Instance and to reverse that of the lower Appellate Court. Apparently Chuni Lal (the second judgment-debtor) has been improperly made a respondent to this appeal, as he was not a party to the proceedings in the lower Appellate Court, the subject of the appeal.

Spankie, J.—I am still of the same opinion as that expressed in the decision of this Court dated the 14th December 1876* to which I was a party.

The terms of s. 216 of Act VIII of 1859 are precise and clear. "If an interval of more than one year shall have elapsed between the date of the decree or the application for its execution, or if the enforcement of the decree be applied for against the heir or representative of an original party to the suit, the Court shall issue notice to the party against whom execution may be applied for, etc., etc." ; but there must be an application for execution, alluding to the provisions of s. 212. It precedes and does not succeed the Court's issue of notice under s. 216 to the heir or representative of an original party to the suit, and where no application for execution has been made within three years from the date of the decree, I do not think that the decree-holder can fall back upon the notice issued under s. 216. If the application under s. 212 were bad, it seems to me that the Court had no power to issue the notice, and under such circumstances the mere issue of the notice cannot be regarded as giving the decree holder a fresh period of limitation. The old procedure [679] applies to this case. The order affirmed by my Honourable colleague would, I suppose, issue. But this appeal was filed on the 9th November, and, therefore, perhaps Act X of 1877 applies. If so, I should wish to refer the point of law to another Judge.

The learned Judges differing in opinion on the point of limitation, the appeal was referred to OLDFIELD, J., under the provisions of s. 575[†] of Act X of 1877. The following **Judgment** was delivered by

Oldfield, J.—I am of opinion that the execution of the decree is not barred by limitation.

The decree-holder filed an application on the 3rd March 1875, accompanied by a copy of the decree, asking that, after service of notice on the judgment-debtor, steps might be taken to realise the amount of the decree. Most of the particulars required by s. 212 were entered in the application, but it was silent as to the mode in which the assistance of the Court was required, whether by delivery

* Misc. S. A. No. 60 of 1875. In this case, decree-holder applied on the 23rd November 1875, for the execution of his decree dated the 25th January 1872, relying on an application dated the 22nd January 1875, as one from which limitation ran. This application prayed that notice might issue, and stated that application would subsequently be made to the Court for its assistance in bringing the property of the Judgment-debtor to sale. A notice was issued, but the decree-holder took no further steps and the execution-case was struck off the file. STUART, C.J., and SPANKIE, J., held that as no application for execution was made within three years from the date of the decree, the decree-holder could not fall back upon the notice issued under s. 216 of Act VIII of 1859 as bringing his application of the 23rd November 1875, within time.

† [Sec. 575 :—When the appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges heard by two or more of the majority (if any) of such Judges.

If there be no such majority which concurs in a judgment varying or reversing the decree appealed against, such decree shall be affirmed :

Provided that if the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, the appeal may be referred to one or more of the other Judges of the same Court, and shall be decided according to the opinion of the majority (if any) of all the Judges who have heard the appeal, including those who first heard it.

When there is no such majority which concurs in a judgment varying or reversing the decree appealed against such decree shall be confirmed.

The High Court may from time to time make rules consistent with this Code to regulate references under this section.]

of property specifically decreed, the arrest and imprisonment of the judgment-debtor, or attachment of his property or otherwise; but this defect in the application will not, I consider, render it of no legal effect for the purposes of limitation. All that the law of limitation enacts is that the limitation shall run from the date of applying to the Court to enforce or keep in force the decree, and all that would seem to be required is that there shall have been an application with the object of enforcing or keeping in force the decree. We should strain the language of the law by putting any other construction on it. If the application is such as to show that it was made with that object, though informal, it will be an application within the meaning of the law of limitation, and there can be no doubt in this case that the application had the object of enforcing and keeping in force the decree.

But the law of limitation also provides that the time shall run from the date of issuing a notice under s. 216 of the Code of Civil Procedure. A notice was issued in this case by the Court acting under s. 216 upon the application above referred to, and it appears to me too that the date of the notice will give a period from which the limitation will run. The issue of such a notice is incumbent on the Court where an application has been made under the circumstances [680] stated in s. 216. The issue of the notice is the act of the Court apart from any requisition by the decree-holder to issue it, and I think it cannot be held that this act of the Court, when purporting to be done under the authority of s. 216, is illegal, and notice issued of no legal effect in consequence, merely because the application filed by the decree-holder, with reference to which the Court acted, may have been irregular in form, or defective in some of the particulars required by s. 212. The fact that the Court treated the application as one for enforcing the decree and issued the notice upon it under s. 216 of Act VIII of 1859 appears to me sufficient.

I find that the rulings of this Court have been conflicting on the points raised in this case. While two rulings^{*} have been pointed out against the view now taken, a later one[†] is in favour of it.

The order of the Lower Appellate Court is reversed and that of the Court of First Instance restored, and this appeal is decreed with costs.

Appeal allowed.

NOTES.

[13 O. C. 303 is a case under the C. P. C. 1908. See also 25 Cal. 594 ; 19 Bom. 261 ; 15 All. 84.]

* *Franks v. Nuneh Mal*, H. C. R., N.-W. P., 1879, p. 79 ; Misc. S. A., No. 60 of 1876, dated the 14th December 1876.

† Misc. S. A. No. 35 of 1877, dated the 26th June 1877. In this case the decree-holder applied, on the 31st August 1870, in the form required by s. 212 of Act VIII of 1859, except that he did not state what was the assistance he desired from the Court. He stated in his application as follows : "Let a notice be issued, and then other applications will be made." A notice was accordingly issued, but as the decree-holder took no further steps in the matter notwithstanding that the Court called on him to do so within three days, the execution-case was struck off the file. Similar applications were made by the decree-holder in March 1872, and on the 22nd January 1875, under which notices were issued. The first of these was struck off the file because the decree-holder failed to comply with the Court's order to make any application he had to make within five days. The second was struck off on the decree-holder's application. He applied on the 1st September 1876 for the execution of the decree, by the arrest of the judgment-debtor, STUART, C.J., and PEARSON, J., held that the decree was capable of execution, observing that "all the applications appear to have been designed to keep in force the decree : the present application was within three years of the last application and *a fortiori* within three years of the notice issued thereunder."

[1 ALL. 680]

APPELLATE CRIMINAL.

The 10th June, 1878.

PRESENT:

MR. JUSTICE PEARSON AND MR. JUSTICE OLDFIELD.

Empress of India
versus
Karan Singh.

Summary trial—Record in appealable case—Judgment—Error or defect in proceedings—Act X of 1872 (Criminal Procedure Code), ss. 228, 283.

K was tried by a Magistrate in a summary way and convicted. He appealed to the Court of Session, which quashed his conviction on the ground merely that the substance of the evidence on which the conviction was had was not [681] embodied in the Magistrate's judgment. Held, that the Court of Session should not have quashed the conviction merely by reason of such defect, but, if it found it impossible to dispose of the appeal because of such defect, it should have required the Magistrate to repair the same by recording a judgment in which the substance of the evidence should be fully embodied, and, if necessary, re-examining the witnesses for that purpose, or to have ordered a retrial with that view.

ONE Karan Singh was tried in a summary way for the offence of receiving stolen property, under s. 411 of the Indian Penal Code by Mr. C. W. Whish, Joint-Magistrate of Basti, and convicted. On appeal by Karan Singh to Mr. J. C. Daniell, Sessions Judge of Gorakhpur, the conviction was set aside by the Sessions Judge on the ground that the Magistrate had failed to comply with the provisions of s. 228* of Act X of 1872, and record a judgment embodying the substance of the evidence on which the conviction was had. The Sessions Judge's judgment was as follows: "In this case the Subordinate Magistrate has disregarded the provisions of s. 228, Criminal Procedure Code, and has not placed on record a judgment embodying the substance of the evidence on which the conviction was had. His judgment contains the points required by s. 227,†

*[Sec. 228 :—If a Magistrate or Bench of Magistrates, acting under section two hundred and twenty-two, two hundred and twenty-three, or two hundred

and twenty-four, passes a sentence of more than three months' imprisonment, or of fine exceeding two hundred rupees; or if a

Bench of Magistrates, acting under section two hundred and twenty-five, convicts any person, such Magistrate or Bench of Magistrates shall, before passing sentence, record a judgment embodying the substance of the evidence on which the conviction was had, and also the particulars mentioned in section two hundred and twenty-seven.

Such judgment shall be the only record in cases coming within this section.]

†[Sec. 227 :—In cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses nor the reasons for passing

Record in cases where there is no appeal. ing the judgment, nor draw up a formal charge, but he or they shall enter in a register, to be kept for the purpose, the following particulars :—

- (a) The serial number;
- (b) The date of the commission of the offence;
- (c) The date of the report or complaint;
- (d) The name of the complainant;
- (e) The name, parentage and residence, of the accused person;
- (f) The offence complained of or proved;
- (g) The prisoner's plea;
- (h) The finding, and, in the case of a conviction, a brief statement of the reasons therefor;
- (i) The sentence; and
- (j) The date on which the proceedings terminated.]

but omits the additional matter required by the next section. The Subordinate Magistrate says that the evidence that defendant sold the bullocks is 'thoroughly reliable' and 'very respectable eye-witnesses' proved the transaction, that the proof that both the bullocks were stolen is established by 'undoubted proof,' but as no detail or description of the evidence is given by the Subordinate Magistrate as is required by law, and without which this Court can form no independent opinion on the character of, or weight which should be attached to, the evidence thus eulogised by the Subordinate Magistrate, his proceedings cannot but be held to be at variance with the law and prejudicial to the prisoner. The sentence appealed against must therefore be quashed, and the Appellant is ordered to be released."

The Local Government appealed to the High Court against this judgment.

The Junior Government Pleader (*Babu Dwarka Nath Banarji*), for the appellant, contended that, as the defect on account of which the Sessions Judge had set aside the conviction did not prejudice the accused in his defence, the conviction should not have been set [682] aside---s. 283 of Act X of 1872. The Magistrate has recorded a judgment in accordance with the provisions of s. 228 of Act X of 1872. If the Sessions Judge considered that the Magistrate's judgment was not in accordance with law, he should have ordered a new trial and not have quashed the conviction.

Babu Dwarka Nath Mukarji for Karan Singh.

The Judgment of the Court was delivered by

Pearson, J.—From the judgment of the Magistrate it may be gathered that it was stated by more than one of the witnesses for the prosecution, first, that the bullocks in question had been stolen; secondly, that they were brought for sale by the prisoner into mauza Amlea; and, thirdly, that he did actually sell them for a very good price. Nevertheless the Sessions Judge is of opinion that the substance of the evidence on which the conviction was had is not embodied in the judgment, apparently because it does not set forth in detail the deposition of each several witness. It is no doubt important that the evidence should be so set forth in the judgment as to enable the Appellate Court to perform its functions in appeal. The prisoner's right of appeal must not be defeated in consequence of an imperfect statement of the substance of the evidence. On the other hand, it does not appear necessary to cancel a conviction and sentence not otherwise apparently exceptionable by reason of such a defect. The Sessions Judge may have found authority in precedents * for the course adopted by him in this case; but we think that, if he found it impossible to dispose of the prisoner's appeal because the substance of the evidence for the prosecution was not sufficiently embodied in the judgment of the Magistrate, it would have been better to have required that officer to repair the defect in his judgment by recording a judgment in which the substance of the evidence should be fully embodied, and, if necessary, re-examining the witnesses for that purpose, or to have ordered a retrial with that view. We therefore cancel the Sessions Judge's order of the 28th January last, and direct him to dispose of the appeal afresh in advertence to the foregoing remarks.

Appeal allowed.

* The only reported case touching the matter seems to be *Queen v. Kheraj Mullah*, 11 I.L.R. 33, which is apparently opposed to the one under report.

[683] APPELLATE CIVIL.

The 14th June, 1878.

PRESENT :

MR. JUSTICE TURNER, OFFICIATING CHIEF JUSTICE, AND
MR. JUSTICE PEARSON.

Mathura Das Plaintiff
versus
 Babu Lal..... Defendant.*

*Acknowledgment in respect of a debt--Limitation--Act IX of 1871
(Limitation Act), s. 20.*

B's agent, under the orders of *B*, wrote a letter to *S* containing an acknowledgment in respect of a debt. This letter was headed as follows :--“Written by *B* to *S*.” The concluding portion of the letter was written by *B* in his own handwriting.

Held that, under these circumstances, there was sufficient evidence that the heading of the letter was written by an agent duly authorized.

Held also, looking at the heading of the letter, that the letter was “signed” by *B* within the meaning of s. 20 of Act IX of 1871.

THIS was a suit for money payable for money lent by the plaintiff to the defendant. With reference to certain items of his claim, the plaintiff relied on a certain letter, dated the 18th December 1874, as containing an acknowledgment in respect of such items taking them out of the operation of the limitation law. The defendant contended that the letter did not contain any acknowledgment in respect of a debt, and that it was not signed by him within the meaning of s. 20, Act IX of 1871. The Court of First Instance held that the letter did not contain any such acknowledgment, and that it was not signed by the defendant within the meaning of that section, and dismissed the plaintiff's claim in respect of such items.

The plaintiff appealed to the High Court, impugning the decision of the Court of First Instance on the question of limitation. The letter on which the plaintiff relied and the material facts of the case are set forth in the judgment of the High Court.

Mr. Conlan and Pandit Bishambar Nath for the Appellant.

The Junior Government Pleader (Babu Dwarka Nath Banaji), Lala Lalta Prasad and Shah Asad Ali for the Respondent.

The Judgment of the Court was delivered by

Turner, Offg. C.J.—The plaintiff, appellant, carries on the business of a banker in the Lashkar of Gwalior, and the defendant, [684] respondent, is a resident of Allahabad who for some years accepted contracts in the Lashkar. In the course of his business the respondent had monetary dealings with the appellant, and in respect of those dealings the appellant asserts that a sum of Rs. 14,812-8-3 is due to him for principal and interest, and to recover this sum he has instituted the present proceedings. It is admitted that several of the

*First Appeal, No. 127 of 1877, from a decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 27th September 1877.

items of the claim are barred by limitation, unless the appellant can establish that, by an acknowledgment of the debt or payment of interest, a new period of limitation accrued. In proof of an acknowledgment, the appellant relies on a letter he received from the respondent, bearing date Mansgar Sudi, 10th Sambat 1931, corresponding with the 18th December 1874, and which is in the following terms :—

"Written by Babu Lal to Shah Benarsi Das, Camp Gwalior, dated Manasar Sudi 10th Sambat 1931.

"After tendering my compliments, I beg to say that your letter came and I know the contents thereof. I received my account in which you have struck a balance of Rs. 17,679-2-0 of the Chandauri coin. You have written me to debit and credit the same, and I have known it. The account is correct, but it has not been running for the last two or three years, and my papers are at Lashkar. Now-a-days a marriage is to be celebrated in my house. I shall send for the papers from Lashkar in Phagun, and, after examining them, I shall make puka debit and credit entries in my accounts, and shall write you to do the same; then I shall make arrangement for the payment of the money. If I fail to procure the money till Phagun, then, according to our agreement at Cawnpore, I shall give you some property yielding a monthly rent of Rs. 150. You will deduct your interest at 7½ annas per cent., and the balance you may credit in my account. In our account of customs and tank there appears some difference in interest, &c. The letter written by me is with you. You should send the same to me. I shall examine the accounts according to the terms agreed upon by us. We shall give credit for any mistake on either side. You have not charged interest on the item relating to the tank, but I shall charge it. I had drawn a hundi for Rs. 5,000 on you, for which you have got a rukka written by me and Babu Sahib. You should send the same to me—all right, Mansgar Sudi, 10th Sambat 1931. If there be any mistake, credit shall be given or taken."

It appears that Bhikhari Das, gomashta of the appellant, accompanied by Gaj Mal, came to Allahabad to obtain from the respondent the payment of the amount then due to the appellant, which was shown by an account then delivered to the respondent to [683] amount to Rs. 17,679-2-0. The respondent stated that he was unable at once to satisfy the demand, but undertook to pay it within two or three months, and that if he failed to do so he would give security. For the satisfaction of the appellant it was arranged that the respondent should send him a letter expressing the terms he had offered, and a draft was prepared by Bhikhari Das of which the respondent did not approve, and he then dictated to Bhikhari Das the draft which was subsequently fairied out by his own gomashta and is the letter dated Mansgar Sudi, 10th Sambat 1931, to which we have referred. The respondent has admitted, in his deposition taken on the 19th July 1877, that this letter was written by his directions, and it is proved that the concluding words "all right, &c.," to the end of the letter, are in his handwriting. The effect of this letter is to admit the existence of a debt due by the sender to the person addressed. While admitting that the account rendered is on the face of it correct, the sender of the letter reserves to himself the right of testing the account by his own books before finally allowing it to be correct, and he then promises to pay what may be due at a time stated, and in the event of default to give security for the debt.

It cannot be doubted that, if this letter has been "signed" by the respondent or his agent duly authorised in that behalf, it constitutes a sufficient acknowledgment to satisfy the Limitation Act.

It is not the practice of Hindu bankers to sign their letter at the foot. Their letters are ordinarily headed, as is the letter on which the respondent relies, with an intimation of the person to whom the letter is addressed and of

the person by whom it is sent. The admission of the respondent that the letter was written by his gomashta by his orders, and the circumstance that he added a paragraph at the conclusion, is sufficient evidence that the heading was written by an agent duly authorised. There remains the question—Is this heading a signature within the meaning of the Limitation Act? The Act does not require that the signature should be at the foot or in any particular part of the document, and in our judgment, whenever the maker of an instrument or his agent acting with authority introduces the name of the maker with a view to authenticate the instrument as the instrument of the maker, such an introduction of the name is a sufficient signature. We do not mean to say that every introduction of the name of the maker into an instrument is a signature. As expressed in an English decision on the Statute of Frauds, the introduction of the name must amount to an acknowledgment by the party that it is his instrument, and if the name does not give such authenticity to the instrument, it does not amount to what the Statute requires, Addison on Contracts, 7th ed., 159. In the heading of such a letter as that which is before us, it is clear the name of the sender is introduced to authenticate the letter, or, in other words, to assure the person to whom it is addressed that the letter is sent by the person named. We consequently find that the letter is "signed" by the sender within the meaning of the Limitation Act, and that it constitutes a sufficient acknowledgment of the debt to satisfy that Act. The claim is therefore in no particular barred by limitation. (The learned Judge then proceeded to determine the appeal on its merits.)

Appeal allowed.

NOTES.

[See also 10 Bom. 71; 18 Bom. 586; 6 Cal. 340; 15 Mad. 380.]

[1 All. 686]

APPELLATE CIVIL.

The 24th June, 1878.

PRESENT:

MR. JUSTICE TURNER, OFFICIATING CHIEF JUSTICE, AND
MR. JUSTICE PEARSON.

Karam Ali.....Decree-holder

versus *

Halima and others.....Judgment-debtors.

Execution of decree—Transfer of decree by operation of law—Act XXVII of 1860—Certificate to collect debts—Act VIII of 1859 (Civil Procedure Code), s. 208.

To enable the heir of a deceased person to apply, under s. 208 of Act VIII of 1859, for the execution of a decree held by such person, a certificate under Act XXVII of 1860 is now indispensable.

* Miscellaneous Second Appeal, No. 12 of 1878, from an order of H. Lushington, Esq., Judge of Allahabad, dated the 19th December 1877, affirming an order of Babu Mritunjoy Mukerji, Munsif of Allahabad, dated the 18th August 1877.

KARAM ALI, the son of Mir Ali, deceased, applied for the execution of a decree for money which had been held by his father. The Court of First Instance rejected the application for the reason that Karam Ali had not obtained a certificate under Act XXVII of 1860 in respect of his deceased father's debts. On appeal by Karam Ali, the lower Appellate Court affirmed the order of the Court of First Instance.

[687] Karam Ali appealed to the High Court.

Mir Akbar Husain, for the Appellant, contended that Karam Ali was entitled to apply for execution of the decree, being admittedly the son of original decree-holder, deceased. He relied on *Ikram Hossein v. Kirtee Chunder* (3 W. R. Misc. 9), and *Gopal Singh Deh v. Gopal Chunder Chukerbutty* (7 W. R. 393); and *Kalee Churn Singh v. Ram Surum Singh* (11 W. R. 204).

Babu Ram Das for the Respondent.

The Court delivered the following

Judgment:—The Munsif appears to think that obtaining a certificate is indispensable to the competency of an heir to apply for execution under s. 208 of Act VIII of 1859. This is erroneous. A person who has not obtained a certificate may apply under that section. It will of course be open to the Court, in the exercise of the discretion vested in it, if there is any doubt that the person applying for execution is entitled by inheritance to the rights decreed, to refuse the application until a certificate has been obtained.¹ The Munsif appearing to consider himself precluded from exercising his discretion, we must set aside his order and the order of the Judge, and remit the case to the Munsif that the discretion may be exercised. Each party will bear his own costs of the proceedings in the Judge's Court and in this Court.

Cause remanded.

[1 All. 687]

APPELLATE CIVIL.

The 27th June, 1878.

PRESENT:

MR. JUSTICE TURNER, OFFICIATING CHIEF JUSTICE AND MR. JUSTICE PEARSON.

Haidri Bai.....Plaintiff

versus

The East Indian Railway Company.....Defendant.*

Act X of 1877 (Civil Procedure Code), s. 549--Procedure in appeal from Decree—Security for costs.

Where the Appellate Court demands from an appellant security for costs, the Court may extend the time within which it orders such security to be furnished, but if no application is made for such extension of time and such security is not furnished within the time ordered, it is imperative on the Court to reject the appeal.

* First Appeal, No. 45 of 1878, from a decree of Rai Makhan, Lal, Subordinate Judge of Allahabad, dated the 21st December 1877.

† Where important questions arise, such as the legitimacy or illegitimacy of the heir, the Court executing the decree ought not to decide them—see *Abidunissa Khatoon v. Amiran-nissa Khatoon*, I.L.R., 2 Cal., 884.

[688] THIS was an appeal to the High Court from an original decree in which the Court had, under s. 549^{*} of Act X of 1877, demanded certain security from the appellant for the costs of the appeal, on the ground that the appellant was residing out of British India and was not possessed of any sufficient immoveable property within British India. The appellant failed to furnish such security within the time fixed by the Court.

Mr. Hill for the Respondents, defendants in the suit, applied for the rejection of the appeal, contending that, under s. 549^{*} of Act X of 1877, it must be rejected.

The Junior Government Pleader (*Babu Dwarka Nath Banarji*) for the Appellant, contended that the Court had discretion to extend the time fixed by it for the deposit of security.

The Judgment of the Court was delivered by

Turner, Offg. C.J.—Security not having been filed within the time ordered by the Court, the law is imperative that the Court shall reject the appeal.

If an application for an extension of time had been made before the expiry of the time within which it was ordered the deposit should be made, the Court might have extended the time; it cannot do so afterwards.

The appeal is rejected with costs.

Appeal rejected.

NOTES.

[I. ENLARGEMENT OF TIME—STATUTORY PROVISION—

The Civil Procedure Code, 1908, sec. 148, expressly confers on Courts power to enlarge time.

[II. CASE LAW—

This case was followed in the early cases of 11 Mad., 190; 11 Cal., 716; but it was overruled by the Privy Council in (1889) 17 Cal., 512 P. C.; see (1891) 16 Bom., 263; 21 Bom., 576. Good grounds will have to be shown for not furnishing the security in time, (1889) 17 Cal. 1; 516.]

Appellate Court may require appellant to give security for costs.

When appellant resides out of British India.

If such security be not furnished within such time as the Court orders, the Court shall reject the appeal.]

* [Sec. 549 :—the Appellate Court may, at its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both.

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immoveable property within British India independent of the property (if any) to which the appeal relates.

[1 All. 688]

PRIVY COUNCIL.

The 5th, 6th and 8th March and 13th April, 1878.

PRESENT:

SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH
AND SIR ROBERT P. COLLIER.

Sheo Singh Rai.....Defendant

versus

Dakho and Murari Lal.....Plaintiffs.

On appeal from the High Court of Judicature for the North-Western Provinces, Allahabad.

Usage of Jains—Estate of sonless widow—Her power to adopt—Position of adopted son—Rights of widow during son's minority—Declaratory decree when to be given—Obstruction to title—Nuncupative will—Special leave to appeal.

On the evidence given in this case, *held* that, according to the usage prevailing in Delhi and other towns in the North-Western Provinces, among [689] the sect of the Jains known as Saraogi Agarwalas, a sonless widow takes an absolute interest in the self-acquired property of her husband; has a right to adopt without permission from her husband or consent of his kinsmen; and may adopt a daughter's son, who, on the adoption, takes the place of a son begotten.

Quere whether on such an adoption the widow is entitled to retain possession of the estate either as proprietor or as manager of her adopted son.

A declaratory decree ought not to be made unless there is shown to be a right to some consequential relief, which, if asked for, might have been given by the Court, or unless a declaration of right is required as a step to relief in some other Court. *Kattama Natchiar v. Dorasinga Tevar*, 15 B. L. R., 83; S.C., L. R., 2 Ind., Ap. 169, approved.

A right to come to the Court to have a document or act which obstructs the title or enjoyment of property cancelled or set aside, or for an injunction against such obstruction, would be sufficient to sustain a declaratory decree.

Semblé.—Where a defendant sets up a nuncupative will as entitling him to property in respect of which the plaintiff asks for a declaration of his right, a right to have such will declared null and void arises in cases where property legally passes by a will of that nature, since a claim under such a will is not a bare assertion of title, but the setting up of a specific act by which title to property may be conferred.

A defendant obtained special leave to appeal to Her Majesty in Council on the ground that the case involved questions of law of great importance to the Jain sect, of which he was a member. On the appeal coming on for hearing, he contended that the suit should have been dismissed by the Courts below as a claim for a declaration of right in respect of which no consequential relief was sought or could be given. *Held* that, considering the special grounds on which the defendant had obtained leave to appeal, the somewhat technical character of the defence he now put forward, and the general circumstances of the case, he ought not to be allowed to insist on this objection.

THE facts out of which this appeal arises are as follows :—

Ishq Lal, a Jain of the sect known as Saraogi Agarwalas, died in 1867, without male issue, leaving self-acquired moveable property. After his death, his widow, Dakho, purchased from the Government, with funds forming part of her husband's estate, the absolute interest in certain lands which he had held from Government under a grant for his life. After the purchase her name was entered on the register as proprietor. On a settlement of these lands in 1871, the Settlement Officer required Dakho to declare who was to succeed her in the property, when she requested that the name of Murari Lal, the son of her daughter, should be entered in the *wajibularz* as her adopted son and successor. To this Sheo Singh Rai, surviving brother of Ishq Lal, objected that Dakho, not [690] having obtained her husband's permission to adopt, could not make a valid adoption without the consent of her husband's relatives, which had not been given. In consequence of this objection, the parties were referred by the Settlement Officer, under an order dated the 15th July 1871, to the Civil Court for a settlement of the questions in dispute between them.

On the 28th September 1871, the present suit was brought by Dakho, as sole plaintiff, against the present appellant, Sheo Singh Rai, as defendant. In her plaint she asked to be " maintained in possession as hitherto by establishment of her exclusive right of inheritance to her husband's estate," and to have the adoption by her of Murari Lal upheld, and his right " permanently to succeed her after her death " declared in opposition to the objection raised by the defendant before the Settlement Officer ; and also for a declaration that the defendant had no right of inheritance as against the plaintiff according to the tenets of the Jain religion.

Sheo Singh Rai, by his written statement, objected that the suit would not lie, as Murari Lal was not a party, and the object of the suit was to establish his future right ; and that, the plaintiff herself had no cause of action. As to the validity of the adoption, he contended that, adoptions among the Jains being governed by the ordinary Hindu law, a widow could not adopt any one unless with the permission of her husband or the consent of his kinsmen, and in no case could she adopt the son of her daughter. The fifth paragraph of the defendant's written statement was in these words : " The plaintiff, as heiress of her husband, possesses only a limited interest. Her right is not permanent, and she has no power to alienate the property. The defendant, the brother of the deceased, is, under the Shastras, as well as a *verbal declaration* of Ishq Lal, the owner and possessor of his whole estate. The plaintiff only possesses a portion of the property by way of maintenance for her life. She will hold it as long as she lives, and then the defendant will be entitled to it as a *reversioner*."

The case was heard by the Subordinate Judge of Meerut, by whom the following issues were recorded :—(i) Has the plaintiff disclosed sufficient cause of action to enable her to seek relief in the Civil Court ? (ii) Is the plaintiff legally competent to sue in her [691] own right after she has divested herself of the right of inheritance derived from her husband, and having invested it in an adopted son ? (iii) By what Shastras or text-book are Jains governed ? (iv) Did Ishq Lal, by a verbal declaration, constitute the defendant (his brother) his heir-at-law, leaving only a life interest in his estate to his widow ? (v) If not by usage and custom of the Jain sect, did the widow legally succeed to her husband's estate in absolute and exclusive right, and is she competent to adopt a son in her own right ?

Witnesses were examined for the plaintiff who gave evidence that the Saraogi sect of Jains were not governed by the Hindu Law, and that, according to their usages, a widow had full power of alienation over her husband's estate, and could adopt without his authority or the consent of his kinsmen, and that a daughter's son might be validly adopted. On the other hand, witnesses were called by the defendant who deposed to a directly opposite effect.

On the 31st May 1872, the Subordinate Judge dismissed the suit on the defence raised on the second issue, holding that, according to her own case, the plaintiff had put herself out of Court by adopting a son, and so divesting herself of any right in respect of which she could ask for a declaratory decree.

On appeal to the High Court this decision was, on the 27th March 1873, set aside, and the suit remanded to be heard on the merits, with directions that Murari Lal should be made a party, and for taking further evidence as to the law of the Jains bearing on the questions in dispute. With regard to the plaintiff's right to maintain the suit, the High Court held as follows :—

"Assuming the widow's right after an adoption to be qualified and limited, we consider that she would be entitled to maintain such a suit as that out of which this appeal arises. She is entitled, her right being disputed, to require the Court to determine whether she takes by Jain law an absolute interest in the property of her husband. She is entitled, her right being disputed, to have a declaration of her right to make an adoption, and of the validity of the adoption made in the exercise of that right. The Court, if it be satisfied that an adoption has been duly made, would of course declare the effect of such an adoption on the widow's estate. The [692] enjoyment of the interest which she alleges she possesses in the estate of her deceased husband having been threatened by the negation of her rights by the defendant, it appears to us that she has a cause of action which entitles her to maintain this suit."

No appeal was made from this judgment, and the suit was subsequently dealt with on remand by the Subordinate Judge, who added the infant Murari Lal as a plaintiff in the suit, and issued interrogatories to the district officers of Delhi, Muttra, Benares, and Jeypore, with the request that they would obtain an exposition of Jain law and customs on the questions in issue from members of the Jain community. In reply to these interrogatories answers were received to the same effect as the evidence given by the witnesses for the plaintiff at the original hearing. In accordance with these answers the Subordinate Judge, on the 22nd December 1873, held that the plaintiff was entitled to be maintained in the lands in question on the ground of her exclusive and absolute right thereto as heir to her husband, and to have a declaration of the validity of the adoption made by her, and of the right of her adopted son to succeed to the estate. The Judge also held that a nuncupative will by the deceased in favour of his brother would not be valid against the widow, but he observed that this last point was immaterial, there being no evidence of such a will having been made.

The defendant, in appealing to the High Court, objected that the answers to the interrogatories issued by the Judge had not been given on solemn affirmation, and should not have been admitted as evidence. The High Court admitted the objection and issued fresh commissions to the Commissioner of Delhi, the Judge of Benares, and the Collector of Muttra, which were returned duly executed. On the evidence thus obtained the High Court, on the 27th November 1874, affirmed the decree passed on remand by the Subordinate Judge. The judgment of the High Court will be found printed at length at page 382 of the sixth volume of the North-Western Provinces High Court

Reports. With reference to the alleged nuncupative will, the High Court observed :

" That a parol bequest is invalid against the widow, when made for secular purposes, is generally admitted by all the witnesses [693] whose evidence we have been considering, though two witnesses allow that small gifts may be so made, and that such a bequest, when duly proved, is valid if made for religious purposes, so that it bear a moderate proportion to the means of the husband. We need not, however, determine the Jain law on this point in this suit, as the appellant has failed to prove that any such bequest was made."

The defendant, being dissatisfied with this decision, applied to the High Court for leave to appeal to Her Majesty in Council on the ground that the law of the Jains in no respect differed from the ordinary Hindu Law, and that the High Court had been wrong, on the evidence before it, in holding the contrary. On the 7th May 1875, the High Court granted a certificate that the case was a fit one for appeal, but the appellant having failed to make a deposit within six weeks as required under s. 2 of Act VI of 1874, the Court, on the 1st July 1875, declined to admit the appeal. Against this order the defendant subsequently appealed to the Privy Council, and on the 24th March 1876, on a representation that the case involved questions of great importance to the Jain community, obtained special leave to appeal.

Mr. Doyne and Mr. W. A. Raikes for the Appellant.—The case of Dakho as stated in her plaint disclosed no cause of action. Two things were asked for in the plaint : first, a declaration of the plaintiff's right to be maintained in possession as heiress of her husband ; second, that the adoption by her of her daughter's son should be upheld as a valid adoption to her husband and herself. But the widow's right to present possession and to enjoy for her life the lands in suit was not really disputed by the defendant. The defendant had never sought to disturb her possession. The suggestion of an oral will having been made by Ishq Lal in the defendant's favour seemed to have been an after-thought of the defendant's pleader when drawing up the written statement of defence. It was a mistake to set up on the part of the defendant an absolute title as heir. The defendant had not put forward any such claim before the settlement officer, nor had he sought to establish it by evidence in the proceedings in the present suit. It was apparent that the defendant had never seriously relied on his heirship under an oral will. The remonstrance which the defendant [694] had made against the irregular entry of Murari Lal's name in the settlement-papers as the widow's adopted son and successor could not afford her a cause of action. She had no *locus standi* to maintain a suit for the declaration of the future and contingent rights of Murari Lal. The objection to such a suit was not removed by making Murari Lal himself a plaintiff. The rule as to declaratory actions was that, when no relief could be given, there should be no declaration of abstract right. The cases of *Sreenarain Mitter v. Sreemutty Kishen Soondery Dassee* (11 B. L. R. 171), *Raja Nilmony Singh v. Kalee Churn Bhuttucharjee* (14 B. L. R. 382; s.c., L. R., 2 Ind. Ap. 83), and *Kattama Natchiar v. Dorasinga Tevar* (15 B. L. R. 83; s.c., L. R. 2 Ind. Ap. 169), established that the Courts ought not to make declaratory decrees, where no right had been shown to consequential relief, arising on the facts alleged and disclosed in the case. The defendant's right of appeal on the ground that the suit could not be maintained was not lost through his not having appealed when the High Court, on the 27th March 1873, remanded the case for trial on the merits, since that was an interlocutory order to which it was competent to object on the final appeal. *Forbes v. Ameeroonissa Begum* (10 Moore's I. A. 340, at p. 359); *Shah Mukhug Lal v. Sree Kishen Singh* (12 Moore's I. A. 184).

[Their Lordships intimated that, before entering on the question as to Jain law and custom raised in the case, they desire to hear the respondents' counsel on the question, whether the suit ought not to have been dismissed, as one in which consequential relief could not be given.]

Mr. Cowie, Q. C., and Mr. Herbert Cowell, for the Respondents.—The High Court had acted rightly under the provisions of s. 15^{*} of Act VIII of 1859. The test in such cases is whether relief might not be given on what appears in the suit—*Sadut Ali Khan v. Khajeh Abdul Gunney* (11 B. L. R. 203, at p. 227). The acts of the defendant amounted to a hostile invasion of the plaintiff's rights affording ground for an action. The defendant disputed a present right either of the widow, or of her adopted son, by lodging what was practically a *caveat* gravely affecting their right of alienation. [Sir Barnes Peacock.—Is the defendant's act more distinctly hostile than the [696] acts alleged in the Rajah of Pachete's case? (*Nilmoney Singh v. Kalee Churn Bhattacharjee*, 14 B. L. R. 382). There is more here than a mere assertion. On the defendant's objection, the Settlement Officer refuses to make out a paper in which the widow was entitled to have her rights recorded, and instead makes an entry requiring legal steps to be taken to clear the matter. It therefore became necessary for the widow to come forward. Moreover, the defendant had set up a nuncupative will, which he alleged had been made in his favour by Ishq Lal. He had persisted in that pretension, making it a ground for his appeal to the High Court that the Subordinate Judge had incorrectly held that there was no evidence of such a will. The attempt to set up such a will was a sufficient ground for a declaratory decree. In the case of *Kattama Natchiar* (15 B. L. R. 83; s.c., I. R., 2 Ind. Ap. 169), the acts alleged were inoperative to effect title, but here it was otherwise. The defendant had obtained special leave to bring this appeal on the ground that questions of law of the greatest interest and importance to the Jain community were raised by it. When the case comes on for hearing, he takes an objection on a point not raised in his petition for special leave to appeal, on which, if he succeeds, those important questions which he desired should be considered will be altogether cut out from consideration. Leave to appeal having been accorded on special grounds, the appeal should have proceeded on these grounds. The observations of the Privy Council in the case of *Itam Sabuk Bose v. Kaminee Koomaree Dossee* (14 B. L. R. 394; s.c. I. R., 2 Ind. Ap. 71), were applicable to his case.

Mr. Doyne, in reply, contended that the expression "lodging a *caveat*" did not correctly describe the defendant's proceedings. The effect of the '*caveat*' was not in any way to disturb the widow's previous possession. She retained the same possession as before. Her claim to have Murari Lal's name inserted in the *wajibularz* was clearly *ultra vires*. The Settlement Officer's duty was to make an entry of existing rights, not of future rights. An entry of the latter kind would tend more than anything else to cloud title. The plaintiff could not have sued for a declaration in respect of the alleged oral will, since the assertion of its existence was first made in the defendant's written statement.

[696] Sir MONTAGUE SMITH intimated that their Lordships would reserve their decision on the point which had been argued until they had heard the whole case.

* [Sec. 15 :—No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right, without granting consequential relief.]

Mr. Doyne, for the Appellant, admitted that, on the evidence before it, the High Court was justified in holding that, according to Jain usage, the widow of a sonless Jain has power to adopt a son to herself and to her husband, such son on his adoption standing in the position of a son begotten, without authority from her husband and without the consent of his kinsmen, and that it is legal for her to adopt a daughter's son. On that evidence, assuming the widow to have taken an absolute estate on her husband's death, she became divested of that estate by the adoption, and had no longer any interest entitling her to a declaration. The Subordinate Judge was right when, in his original judgment, he dismissed the suit on this ground. The decision of the Judge on the remand that the widow was entitled to be maintained in possession as proprietor was wrong on the evidence, and the High Court did not mend the matter by substituting the alternative declaration that she was entitled to retain as proprietor, or as manager on behalf of her adopted son. Such a decision was bad from uncertainty. The declaration really sought in the plaint was a declaration of the future rights of Murari Lal, whereas on the evidence it appeared that Murari Lal's rights had vested. A declaration in the terms of the plaint would be prejudicial to him.

Mr. Raukes followed on the same side.

Mr. Cowie, Q. C., for the Respondents.—There had been some discrepancy in the evidence given as to the rights of the female plaintiff. One set of witnesses affirm that she has a life interest; another that the plaintiff Murari Lal has a present immediate right. The Court does not consider it necessary to pronounce which evidence is correct. It finds alternatively. This is all that is needed for the present suit. The defendant objects to the interest of both plaintiffs. The Court decides in favour of the plaintiffs as against the defendant, but does not think it proper to decide as between the plaintiffs.

Mr. Doyne replied.

[697] Their Lordships took time to consider their Judgment, which was delivered by

Sir Montague E. Smith.—This is an appeal from a judgment of the High Court of the North-West Provinces, which substantially affirmed a decree of the Subordinate Judge of Meerut. The suit was originally brought by the respondent Dakho, the sonless widow of Ishq Lal, in her own name; Murari Lal, her daughter's son, whom she had adopted, being afterwards added as co-plaintiff. The defendant (the appellant) was a younger brother of Ishq Lal. The family were Saraogi Agarwalas, one of the divisions of the sect of Jains, whose laws and customs with regard to a widow's estate and her power of adoption differ, as the respondents allege, from the ordinary law by which Hindus are governed. This difference gives rise to the principal questions to be decided in the present suit. Ishq Lal died in 1867. He left considerable property, including Government notes, to the value of upwards of five lakhs of rupees. The widow took out the certificate of administration of his estate, and obtained possession of it. It is admitted that the adoption by the Musammat of her grandson was made without any authority expressly derived from her deceased husband, and without the consent of his kindred—an adoption, therefore, which on that ground, as well as by reason of the relationship of the parties, would be invalid by ordinary Hindu law. The immediate occasion of the suit arose in the following manner:—Ishq Lal, who had been an army contractor, received from the Government as a reward for services rendered during the mutiny a grant for his life of the zamindari of mauza Nabali, in Pargana Bagpat, an estate to which Government had acquired title by forfeiture. After his death the Government offered to sell the mauza to his widow, and she

purchased it at the price of Rs. 6,206. It has been assumed that the purchase-money was paid out of the proceeds of her deceased husband's estate. It appears that, whilst making up the *wajibularz* (a document called by the Subordinate Judge "the village administration-paper"), the Settlement Officer called upon the widow to name her successor to the mauza, with a view to enter the name in this paper, and that in answer to this requisition she requested that the name of Murari Lal should be recorded as her adopted son and successor. The appellant objected [698] to this being done, and the Settlement Officer thereupon ordered the following special entry to be made in the *wajibularz* :

"Para. ix.—Regarding special tribes and customs of adoption, second marriage, or succession.

"Musannat Dakho desired that Murari Lal, her daughter's son, whom she adopted, should succeed her after her death. But Sheo Singh Rai, the younger brother of her husband, on hearing this, objected that it is illegal that an adoption should take place without the permission of the husband's near relations. The Settlement Officer therefore passed the following order on the 15th July 1871 :—'The parties may get this point decided by the Civil Court, and all points of this paragraph shall be decided by order of the Civil Court.'"

Both the Courts in India have stated that the Settlement Officer in calling upon the Musannat to name her successor, acted in excess of his powers. It has not been shown what is the precise object of the *wajibularz*, nor what are the regulations or orders under which it is made. The reference to "Paragraph ix.—Regarding special tribes and customs of adoptions, second marriage, or succession," seems to indicate that, when these special customs are found to exist, it is desired that they should be recorded for the information of the Settlement authorities. The Settlement Officer directed that the order he had made for the above entry should be communicated to the Musannat by the Tahsildar, and that she should be advised to have the question of adoption settled by the Civil Court. The present suit was thereupon brought; and, in consequence of an objection which has been taken to its maintenance, as being a declaratory suit only, it will be necessary to advert to the proceedings in it.

The plaintiff (the widow being sole plaintiff) asserts in a general and somewhat informal manner her claim to be maintained in possession, "by establishment of plaintiff's exclusive right of inheritance to the estate of her husband, composed of the mauza above described, and to uphold the adoption of Murari Lal, plaintiff's daughter's son, as well as his right permanently to succeed her after her death, by voiding the defendant's pretensions, under the usages and customs of the Saraoji religion." It then alleges that the defendant, during the progress of the late settlement raised the objection that the widow cannot, unless with the consent [699] of the relations of the family, make an adoption, and that the plaintiff was referred to the Court by the Settlement department.

The defendant, in his written statement, after objecting to the suit on the grounds that the adopted son was not made a party to it, that the entry in the *wajibularz* did not give a cause of action, and that the suit was unnecessary and premature, stated in his defence on the merits as follows :—

"(iii) The law of inheritance applicable to the Jains is nothing different from the Shastras. They are all subject to the common Hindu law. Therefore, both according to law and custom, the adoption of a daughter's son is invalid; moreover, the custom of adoption is not universally recognised among the people of this sect.

"(iv) Among the Jains, a widow is not competent herself to adopt a son unless with the permission of her husband or the consent of the near heirs.

"(v) The plaintiff, as heiress of her husband, possesses only a limited interest. Her right is not permanent, and she has no power to alienate the property. The defendant, the brother

of the deceased, is, under the Shastrus as well as a verbal declaration of Ishq Lal, the owner and possessor of the whole of his estate. The plaintiff only possesses a portion of the property by way of maintenance for her life. She will hold it as long as she lives, and then the defendant will be entitled to it as reversioner."

Evidence having been taken respecting the customs and tenets of the Sarnogi Agarwala Jains, the Subordinate Judge, without specially deciding upon these customs, dismissed the suit on the ground that the plaintiff, by adopting a son who, upon adoption, would become, if his adoption were valid, heir to his father, "had raised a barrier" to her own claim of absolute right. Upon appeal to the High Court, the Judges were of opinion that the Subordinate Judge had not sufficiently inquired into and ascertained the special customs of the Jains, and that he was wrong in dismissing the suit. The Court, therefore, remanded the suit under section 351 of the Civil Procedure Code, and directed that an opportunity should be given for making the adopted son a party to the suit.

The following passage of the judgment contains the view of the Court with regard to the nature and scope of the inquiry to be made by the Subordinate Judge :—

" We are invited by the pleaders of the parties in this Court to give directions to the Court below on the questions of Jain law which are raised in this suit.

[700] " The Jains have no written law of inheritance. Their law on the subject can be ascertained only by investigating the customs which prevail among them; and for the ascertainment of those customs we think the Court below would exercise a wise discretion if it issued commissions for the examination of the leading members of the Jain community in the places in which they are said to be numerous and respectable, *viz.*, Delhi, Muttra, and Benares. The questions to be addressed to these gentlemen would be the following :—

" " What interest does the widow take under Jain law in the moveable and immoveable property of her deceased husband, and does her interest differ in respect of the self-acquired property and the ancestral property of her husband? Is a widow under Jain law entitled to adopt a son without having received authority from her husband, and without the consent of her husband's brother? May a widow adopt the son of her daughter? By the adoption of a son, does the adopted son succeed as the heir of the widow or as the heir of her deceased husband? Has the adoption of a son by a widow any effect, and (if any) what effect in limiting the interest which she takes in her husband's estate? And if the Subordinate Judge considers that the verbal gift which the respondent alleges is established by proof, he might further inquire whether such a gift is valid as against the widow? "

Upon the suit being thus remanded, Murari Lal, the adopted son, was made a co-plaintiff, the Musammat being appointed his guardian.

Commissioners to take evidence as to the customs of the Sarnogi Agarwala Jains were then issued to Delhi, Jeypore, Muttra, and Benares, and several leading members of that division of the Jain community were examined under them at each of these places. The Subordinate Judge has thus summarised their evidence.

" With the exception of one from Delhi, the others unanimously declare that in the absence of any son, a Jain widow succeeds to the estate of her husband moveable and immoveable, in the absolute right (ii) That she can deal with it at pleasure and without restriction. (iii) That she can adopt her daughter's son, without requiring any consent or authority from her deceased husband or relative, of such deceased; and that such adopted son would succeed to her deceased husband's estate in the same manner as her own begotten son would have done with a slight restriction. (iv) That a nuncupative will by her husband would not be valid against her; but this last point does not at all bear on the case, seeing that there is no evidence as to any such will having been pronounced."

[701] The Subordinate Judge then made a decree in favour of the plaintiff in the following terms :—

" That the plaintiff is entitled to a decree to be maintained in possession of the zamindari property in question, on the ground of her exclusive and absolute right thereto as heir of her husband, and for a declaration of the validity of the adoption made by her, and of the right of her adopted grandson by her daughter, there being nothing to prevent his succession to the estate."

The defendant again appealed to the High Court, one of his grounds of appeal being that the witnesses, except at Joypore, had not been examined on oath. Another ground was, " That the finding of the Subordinate Judge as to there being no evidence regarding the nuncupative will by the deceased husband of the plaintiff in favour of the appellant was incorrect."

On this appeal coming on to be heard, the Judges of the High Court held that the evidence objected to had been irregularly taken, and being of opinion that it would not be proper to decide the important questions of Jain law involved in the case upon the evidence of the Jeypore witnesses alone, they determined, before finally disposing of the appeal, to issue fresh commissions from their own Court to Delhi, Muttra, and Benares. Those commissions were accordingly issued, and under them the original and new witnesses were examined, whose testimony was given at greater length than that on the first occasion. Upon the return of these commissions, the cause was finally heard by the High Court, and the judgment now under appeal pronounced. It contains the following general account of the history and religious tenets of the Jains :—

" The parties are Sarogi Agarwalas, one of the numerous sub-divisions of the sect of Jains. What little is known of the history of that sect is to be found collected in the learned judgment of the Chief Justice of Bombay in *Bhayrandas Tejmal v. Rajmal* (10 Bom. H.C. R. 241). For upwards of eleven or twelve centuries they have seceded from the creed of the Vedas, and their religious tenets have more affinity with the precepts of the Buddhists than with those of the Brahmins. They recognise the caste system of the Brahminical Hindus, and in such ceremonies as they retain generally avail themselves of the assistance of a Brahmin.

" They differ particularly from the Brahminical Hindus in their conduct towards the dead, omitting all obsequies after the corpse is burnt or buried. They also regard the birth of a son as having no effect on the future state of his progenitor, and, consequently, adoption is a merely temporal arrangement and has no spiritual object."

[702] The Judges then proceed to an elaborate review of the decisions in India in which the laws and customs of the Jains have been considered. It appears to have been contended before them, to use the words of the Court, " that the applicability to Jains of the laws of the Brahminical Hindus, or what is generally termed Hindu law, had been established by so many rulings that the Court was bound to apply it to this case"; and, further, that no uniform and consistent body of customs and usages existed among the Jains which would enable the Court to affirm that the general law was modified by them. It certainly appears that, in most of the decisions referred to by the Judges, the Courts had held that there was no sufficient proof of the existence of special customs among the Jains to displace or modify the general law, though in others, where sufficient proof of special customs appeared, effect had been given to them. Their review of these previous decisions led the Judges to the conclusion that they were not opposed to the view that the Jains might be governed, as to some matters, by special laws and usages, and that, where these were

satisfactorily proved, effect ought to be given to them. The learned counsel for the appellant who argued the case at their Lordships' Bar felt himself unable to dispute the correctness of this conclusion.

It would certainly have been remarkable, if it had appeared that in India, where, under the system of laws administered by the British Government, a large toleration is, as a rule, allowed to usages and customs differing from the ordinary law, whether Hindu or Muhammadan, the Courts had denied to the large and wealthy communities existing among the Jains, the privilege of being governed by their own peculiar laws and customs, when those laws and customs were, by sufficient evidence, capable of being ascertained and defined, and were not open to objection on grounds of public policy or otherwise.

It no doubt appears from the judgment of the High Court of Bombay delivered by WESTROPP Chief Justice, in *Bhagvandas Tejmal v. Rajmal* (10 Bom. H. C. R. 241) that the Judges of that Court were not satisfied that in the Presidency of Bombay usages had been established to exist among the Jains at variance with ordinary Hindu law. "Hitherto," they say, "so far as we can discover, none but [703] ordinary Hindu law has been ever administered either in this island, or in this Presidency, to persons of the Jaina sect." This view was expressed by the Judges after considering and commenting upon several extracts from historical and text writers. They also remark upon the impolicy of introducing departures from the general law. Their Lordships, however, do not understand the Judges to say that customs having such an effect may not lawfully be given effect to, if established by sufficient evidence. On the contrary, their judgment contains this passage:

"But when amongst Hindus (and Jains are Hindu dissenters) some custom different from the normal Hindu law of the country in which the property is located and the parties resident is alleged to exist, the burden of proving the antiquity and invariability of the custom is placed on the party averring its existence."

Reference was also made to the observations of this Board respecting the proof required to establish customs in the case of *Ramalakshmi Ammal v. Sivanatha Perumal Sethurayar* (14 Moore's I. A. 570, see at p. 585).

The facts in the case before the High Court of Bombay were that, after the death of both husband and wife, the brothers of the deceased husband, with the consent of the "Panch" ('Panch,' the senior members of the community acting as arbitrators) chose a nephew of the husband to be his son by adoption. The evidence given in support of such a custom of adoption was slight, and the Court held that it was not sufficiently proved. It is said in the judgment, "not a single *yati*, or *pandit* or priest, or other expert, either in the lore of the Jainas or of the Brahmins, has been called to prove the alleged custom." Undoubtedly such a custom being, as the Judges point out, opposed to the spirit of the Hindu law of adoption, would require strong evidence for its support, and such evidence appears to have been wholly wanting in that case.

In the present case their Lordships consider that the Judges of the High Court were right in thinking that their decision should be governed by the evidence taken in this suit. This evidence, particularly that taken at Delhi, is entitled to great weight, having regard both to the status of the witnesses, and to the consistent manner in which they describe the custom. It is stated in the judgment below that "Delhi is the chief seat of the Jains in the north-west of India, and is the adjoining district to that in which the property is situated,

The manner in which the witnesses were [704] called together to be examined." and their position in the Jain community, are thus described in the judgment :

" The Commissioner reports that, on receipt of the Court's commission, he called upon the Deputy Commissioner to furnish him with a list of the names of the principal members of the Jain community residing in Delhi ; that out of 125 persons whose names were so furnished, he selected 26 persons, whom he summoned to attend his Court, and that out of the 26, he examined six, of whom two, Zora Mul and Gyan Chand, were elders of the council of the sect at Delhi appointed to determine all questions of religious and social importance arising in the sect, while the other four persons selected were all of a rank that entitled them to admission to the Lieutenant-Governor's Darbar. Of these also, one Baldeo Singh, deposed he was a member of the Council before-mentioned. Furthermore, the Commissioner, at the instance of the appellant, took the evidence of two others out of the 26 persons summoned. As all the witnesses so selected by the Commissioner must be presumed to have been impartial, and as either party was at liberty by the terms of the commission to produce any witness he desired should be examined, and the appellant availed himself of this privilege only so far as to examine two of the witnesses summoned by the Commissioner, it is hardly going too far to say that no better parol evidence could be obtained than was taken under the Delhi Commission."

Their Lordships are relieved from an examination of this evidence in detail, since the learned counsel for the Appellant felt constrained to admit that the conclusions drawn from it by the Court were in the main correct. These findings are thus stated in the judgment, and their Lordships entirely concur in them :

" Contrasting this evidence with that given by the independent witnesses examined under the several commissions and having regard to the position which several of the Delhi witnesses hold as expounders of the law of the sect, it cannot be doubted that the weight of evidence greatly preponderates in favour of the respondents. It appears to us that, so far as usage in this country ordinarily admits of proof, it has been established that a sonless widow of a Saraogi Agarwala takes by the custom of the sect a very much larger dominion over the estate of her husband than is conceded by Hindu law to the widows of orthodox Hindus; that she takes an absolute interest at least in the self-acquired property of her husband (and as we have said, it is not necessary for us to go further in this suit, for the property in suit was purchased by the widow out of self-acquired property of her husband); that she enjoys the rights of adoption without the permission of her husband or the consent of his heirs; that a daughter's son may be adopted, and on adoption takes the place of a begotten son. It also appears [705] proved by the more reliable evidence that on adoption the estate taken by the widow passes to the son as proprietor, she retaining a right to the guardianship of the adopted son and the management of the property during his minority, and also a right to receive during her life maintenance proportionate to the extent of the property and the social position of the family."

The Court adds :

" We do not, however, desire to be understood as ruling this point in this suit for the widow, and the adopted son has not been separately represented at the bar, and we have not had the benefit of such assistance from the bar on this point as on the other issues, there being at present no contest between the widow and her adopted son as to their respective rights. We shall affirm the decree of the Subordinate Judge declaring the validity of the adoption and the right of the adopted son to succeed to the estate in suit as a begotten son, but we shall vary the decree of the Subordinate Judge so far as it declares the widow entitled to be maintained in possession as proprietor, by inserting the alternative, or as manager on behalf of her adopted son."

Their Lordships will advert hereafter to the form of the decree. They will now proceed to consider the objections raised to the suit, on the ground that it is merely declaratory, and can lead to no relief. It is scarcely necessary

to say that their Lordships desire to adhere to the opinion declared in several decisions of this Board that s. 15^{*} of the Indian Act VIII of 1859, relating to declaratory decrees, ought to receive the same construction as s. 50 of the English Act, 15 and 16, Vic., c. 86, which is similarly worded, has received from the English Courts. In the last of these decisions the English and Indian cases on the subject were reviewed, and it was laid down that a declaratory decree ought not to be made unless there is a right to some consequential relief which, if asked for, might have been given by the Court, or unless in certain cases a declaration of right is required as a step to relief in some other Court—*Kattuma Natchiar v. Dorasinga Tevar* (15 B. L. R., 83; s.c., L. R., 2 Ind. Ap. 169).

The question whether a right to some consequential relief exists must therefore arise in all suits in which a declaration of title is sought. It is enough for the present purpose to observe that a right to come to the Court to have a document or act which obstructs the title or enjoyment of property cancelled or set aside, or for an injunction against such obstructions, would be sufficient to sustain a declaratory decree.

[706] It was contended on behalf of the respondents that the intervention of the appellant in the proceedings of the Settlement Officer, and his objection to the entry in the *wajibularz* of the name of Murari Lal as the adopted son of the Musammat, on the ground that the adoption was illegal, was an act of obstruction against which they were entitled to relief; and if it had been shown that the entry thus objected to had been necessary to the settlement of the mauza, or the completion of the title, or the right to present possession, the contention might have been well founded. But this has not been shown. It would seem that the mauza had been already granted by the Government to the Musammat, and she had been recorded as proprietor. The object of the paper appears to be, as already stated, to record peculiar customs and rights for the information of the Settlement Officer; and although the Deputy Collector asked for information as to the Musammat's successor, and upon the appellant's objection to the entry of the adoption, placed his objection upon the *wajibularz* and referred the parties to a Civil Court, their Lordships would have felt great difficulty to say the least, if it had been necessary to give a decision upon this point, in coming to the conclusion that these proceedings were such an obstruction to the title or right of possession as would sustain the decree.

Another ground on which it was alleged the plaintiffs were entitled to relief was that the appellant had put forward a nuncupative will of his deceased brother, by which he was made the proprietor of the estate, and that the plaintiffs were entitled, if they had asked for it, to a decree annulling that will. It would not probably be disputed that, if a fictitious will in writing be set up, the heir, upon a proper case being made, might claim to have the document cancelled, and their Lordships are not prepared to say that, in cases where property may legally pass by an oral will, an analogous right to have it declared null may not exist. A claim under such a will is not a bare assertion of title, but the setting up of a specific act by which title to property may be conferred. The reasons, too, for giving such relief in the case of written wills would seem to apply to nuncupative wills, and one of them, the probable deaths of witnesses, with even greater force to the latter than the former. It was, however, contended on behalf of the appellant that **[707]** relief against this will was not one of the objects of the original suit,

* [q. v. *supra*, 1 All. 694.]

which was confined to the intervention of the appellant in the settlement proceedings. Undoubtedly the plaint refers only to this intervention, and the assertion of this will appears for the first time in the defendant's answer. But it will be found, on reference to the proceedings, that the claim was persisted in after Murari Lal had been added as a co-plaintiff, and, indeed, to the end of the suit. One issue framed at the first hearing of the cause was, whether the verbal will had been in fact made, and one of the questions put to the witnesses examined upon the customs of the Jains was, whether a verbal gift is valid against the widow. The commissions in which this question appeared were issued after the first remand to the Subordinate Judge, and after Murari Lal had been made a co-plaintiff. In his judgment given after the return of these commissions, the Subordinate Judge expressly finds on this issue that a nuncupative will by the deceased husband would not be valid as against the widow; and although he adds that there was no evidence that such will had been "pronounced," the defendant, in one of his grounds of appeal to the High Court, complains that this finding is not correct, and the High Court deals with the question of this will in its final judgment. The contention then on the part of the appellant that his putting forward of this will ought not to be regarded, is reduced to the objection that it was not introduced into the original plaint. It is, however, questionable whether, when Murari Lal was made a plaintiff, the suit ought not to be considered for this purpose as a new suit, and whether the appellant, having before that time put forward the claim in question and persisted in it to the end, relief might not, if asked for, have been granted against it. It would not be necessary that the suit should have been in fact remodelled when Murari Lal became plaintiff so as to ask for this relief, it is sufficient if it might have been so remodelled, and relief obtained.

Their Lordships, however, do not think it necessary to give a definite judgment on this question, because they are of opinion that, under the circumstances in which this appeal to Her Majesty comes on to be heard, the appellant ought to be precluded from insisting on his objection to the decree on the ground of its being declaratory only.

[708] In his petition to the High Court for leave to appeal to Her Majesty, the appellant made no reference in the grounds of appeal to this objection to the decree. The leave granted by the High Court having become abortive, in consequence of the deposit for costs not having been made in due time, application to this Board for special leave to appeal was made. In the petition for this leave, again, no reference was made to this objection, but the application was based on the ground that important questions affecting a large community were involved in the decision sought to be appealed from. This petition, after fully stating the conclusions of the High Court upon the evidence relating to Jain customs, contains the following passage: "The petitioner now humbly submits that the suit is one concerning properties of large value, and involving questions of great importance to the sect of the Jain community, to which the petitioner belongs." Their Lordships having, on this ground, advised Her Majesty to grant special leave to appeal, they are invited, when the appeal comes on to be heard, not to examine or consider the important questions thus indicated, but to reverse the judgment on a ground which altogether excludes their discussion. Their Lordships do not by any means intend to lay down, as a rule, that no questions can be raised at the hearing which are not indicated in the petition for special leave to appeal; but, in the present case, considering the whole course of the proceedings in the Court below, to which they have fully adverted,

the importance of the questions upon which the appellant obtained special leave to appeal, and the somewhat technical character of the objections raised to the maintenance of the suit, they think the appellant ought not, at this stage, to be allowed to insist that, by reason of these objections, the decree appealed from should be reversed.

Exception has been taken to that part of the decree of the High Court which varied the decree of the Subordinate Judge declaring that the widow was entitled to be maintained in possession as proprietor, by substituting the declaration that the widow is entitled to retain possession of the estate, either as proprietor, or as manager thereof on behalf of her adopted son, Murari Lal. The substituted declaration, being in the alternative, is no doubt in one sense uncertain, but it is independent of the other declarations which decide the right of the parties as between the plaintiffs on the one [709] side, and the defendant on the other, and repel the defendant's pretensions. The Court, indeed, could not properly make a binding declaration as between the adoptive mother and the adopted son, both being plaintiffs. It is no doubt on this account that the decree, whilst it declares the rights of the widow to present possession as against the defendant, is framed in a form which avoids prejudice to the rights of the plaintiffs *inter se*.

In the result their Lordships will humbly recommend Her Majesty to affirm the decree of the High Court with costs.

NOTES.

[I. APPLICABILITY OF HINDU LAW TO JAINS—]

In the absence of proof of usage or custom, the general Hindu Law is applicable :—
 (1878) 4 Cal. 744 P. C.; (1892) 16 Mad., 182; (1880) 3 All., 55; (1907) 29 All., 495; (1909) 11 Bom., L. R., 797.

It has been applied to Sikhs also :—(1903) 31 Cal., 11 P. C.; (1903) P. R. 84.

Custom or usage where shown, overrides the general law :—(1894) 19 Bom., 428.

[II. ADOPTION AMONG JAINS—]

The general Hindu Law was applied in (1880) 3 All., 55 where the parties were of a different sect; also in (1892) 16 Mad., 182. In (1899) 27 Cal., 379 this case was followed; (1908) 30 All., 197; (1894) 16 All., 379; (1886) 8 All., 319 (a case of second adoption).

[III. DECLARATORY DECREE.—]

See also (1904) 7 O. C. 187.

[IV. TECHNICAL OBJECTIONS—]

See also (1886) 8 All., 365.]

[1 All. 709]

APPELLATE CIVIL.

The 24th April, 1878.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR. JUSTICE PEARSON.

Debi Singh.....Defendant

versus

Bhop Singh and others.....Plaintiffs.*

Pre-emption - Pleader's fees—Act XX of 1865, s. 37.

Held, in a suit for pre-emption, where it was found by the Court that the actual price of the property was less than the price stated in the deed of sale and the Court gave the plaintiff a decree with costs, that the amount payable by the defendant in respect of the fees of the plaintiff's pleader ought to be calculated, not on a valuation of the property which was found to be false, or on the amount on which the Court-fee on the plaint was paid, but on the real value of the property as found by the Court.

THIS was a suit to enforce the plaintiffs' right of pre-emption in respect of certain shares in certain villages. The suit, which was founded on special agreement, was valued, for the purposes of the Court Fees Act, at Rs. 1,370-5-0. For the purposes of jurisdiction it was valued at Rs. 6,000, the amount entered in the deed of sale as the price of the property. This price the plaintiffs alleged was not the actual price of the property. The Court of First Instance found that the actual price of the property was Rs. 2,300, and gave the plaintiffs a decree with costs.

The defendant appealed to the High Court, contending, among other things, that the fees of the plaintiffs' pleader ought not to be calculated on the value of the property as stated in the deed of sale.

[710] Munshi Hanuman Prasad and Babu Oprokash Chandar for the Appellant.

Pandit Nand Lal for the Respondents.

The following **Judgments** were delivered by the Court :—

Pearson, J., after disposing of the other pleas in appeal, continued :—The pleader's fee clearly should not be reckoned upon a valuation of the properties which is found to be false. Whether it should be calculated on Rs. 2,300, the real value as found in the decision, or Rs. 1,370-5-0, the amount on which the Court-fee on the plaint was paid, may be a question. The latest opinion seems to be in favour of the former mode of calculation, which should therefore be adopted in substitution for that which has been adopted in the Court below. With this slight modification, I would affirm the lower Court's decree and dismiss the appeal with costs.

* First Appeal, No. 16 of 1878, from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 8th November 1877.

Stuart, C.J.—I entirely approve of the view taken of this case by my colleague, Mr. Justice PEARSON, and I quite agree with him as to the principle on which the pleader's fee should be calculated. The appeal is dismissed with costs.*

Appeal dismissed.

[1 All. 710]

FULL BENCH.

The 24th April, 1878.

PRESENT:

SIR ROBERT STUART, Kt., CHIEF JUSTICE, MR. JUSTICE PEARSON,
MR. JUSTICE TURNER AND MR. JUSTICE SPANKIE.

A. L. Seale.....Defendant

versus

Brown.....Plaintiff.[†]

Will - Executor, power of—Act X of 1865 (Succession Act), s. 269—Mortgage — Power of sale.

Certain persons, being executors of the will of an Englishman domiciled in India, such will having been made after the Indian Succession Act came into operation, and charging the testator's estate with the payment of his debts, having as such executors borrowed certain moneys from a bank wherewith to discharge debts incurred by them in the administration of the estate of [711] the testator, gave as such executors to such bank a bond for the payment of such moneys on a certain date. By a second instrument, bearing the same date as the bond, they mortgaged as such executors aforesaid to the manager of such bank all their right, title, and interest in certain real estate of the testator, as security for the payment of the moneys, authorising and empowering, in default of payment of the same, the manager, his successors or assigns, absolutely to sell such real estate, either by private sale or public auction, for the realisation of the moneys and to sign a conveyance or conveyances, and a receipt or receipts for the purchase-money, and declaring that such conveyance or conveyances, receipt or receipts, should be as valid as if the same were signed by them. By a third instrument, bearing the same date as the other two, they as such executors aforesaid constituted the manager of the bank for the time being their true and lawful attorney for them and in their names and as their act and deed to sell such real estate and to do all acts necessary for effecting the premises. Default having been made in payment of the moneys by an instrument in writing which recited the instruments already mentioned, the manager of the bank for the time being, described as such in the exercise of the power of sale and for the purpose of re-inbursing to the bank the moneys, granted and conveyed to *B* such real estate and all the estate and interest therein of the executors freed from the mortgage above recited, and the manager for the executors executed the usual covenants for title and further assurance. *B*, having been resisted in obtaining possession of such real estate under such conveyance by a legatee of the testator, sued the legatee and the executors for a declaration of right to, and for possession of, such real estate in virtue of such conveyance. The legatee contended that the executors had no authority to confer a power of sale.

* Under the rules framed by the High Court under s. 37 of Act XX of 1865, in suits for moveable and immoveable property, where the amount or value of the claim does not exceed Rs. 5,000, five per cent. is the largest amount payable by any party in respect of the fees of his adversary's pleader. After Rs. 5,000 and up to Rs. 20,000, two per cent. is payable, *vide* C. O., dated the 23rd April 1866.

† Regular Appeal, No. 99 of 1876, from a decree of R. Alexander, Esq., Subordinate Judge of Dehra Dun, dated the 20th May 1876.

Held (STUART, C.J., dissenting) that the executors had such authority under s. 269 of the Indian Succession Act, and that the conveyance was accordingly valid and operated to transfer the property to *B*.

THE plaint in this suit stated that the plaintiff claimed to obtain a declaration of right to, and recover possession of, the estate called Rockville, or Jabberkhet, situated in the district of Dehra Dun, adjoining the Cantonment of Landour by virtue of a deed of sale, dated the 19th October 1875, and executed under a written power of sale, dated the 20th July 1874, from the defendants Sarah Emma Seale, Robert Edward Seale, and William Frederick Seale, acting as executrix and executors of the will of the late Colonel Robert Henry Seale, deceased, the owner of the said estate, the said deed of sale being executed by the defendants the Delhi and London Bank in favour of the plaintiff in consideration of Rs. 35,000; and that the cause of action arose on the 16th December 1875, when the defendant Alfred Leonard Seale refused to deliver possession of [712] the said estate to the plaintiff, and denied the plaintiff's title thereto, as well as the validity of the said deed of sale. The defendant, Alfred Leonard Seale, set up as defence to the suit, amongst other matters, that the deed of sale was invalid, the defendants, Sarah Emma Seale, Robert Edward Seale, and William Frederick Seale, having no power under the said will to delegate to the defendant Bank their powers as executrix and executor to sell. The material facts of the case were these: -

Colonel Robert Henry Seale, an Englishman domiciled in India, by his will dated the 24th March 1869, charged his real and personal estate with the payment of all his just debts, and appointed his wife, Sarah Emma Seale, and three of his children, Mary Victoria Read, Robert Edward Seale and William Frederick Seale, his executors. Colonel Seale died on the 1st April 1869, and probate of his will was granted to all the persons appointed by him as executors. In December 1869, Mrs. Seale applied to the Delhi and London Bank for a loan to discharge debts incurred in the administration of the testator's estate, offering to mortgage a portion of the estate as security for the loan. The loan was granted, a bond to secure the amount being executed by Mrs. Seale, R. E. Seale, and W. F. Seale, as executors, and a mortgage-deed of a portion of the estate being executed by Mrs. Seale as executrix. The debt thus created not having been discharged, on the 21st August 1872, another bond for the amount due was executed by Mrs. Seale, R. E. Seale, and W. F. Seale, as executors of Colonel Seale, and by the same persons in the same character a portion of the testator's estate was mortgaged to secure the amount due on this bond. Default having been made in payment of this bond-debt, the Delhi and London Bank instituted a suit for its recovery, and for an order directing the sale of the mortgaged property for the satisfaction of the debt. On the 15th July 1874, the cause came on for trial, but before its decision it was withdrawn, terms having been arranged between the parties, and embodied in the deeds next mentioned. By a bond dated the 20th July 1874, Mrs. Seale, R. E. Seale, and W. F. Seale, describing themselves as executors of the will of Colonel Seale, bound themselves to pay to the Bank Rs. 34,250 and interest. By a second instrument, duly registered and bearing the same date as the bond, the same persons, [713] under the same description, conveyed to the Manager of the Bank, as security for the debt created by their bond, all their right, title, and interest in the estates of the testator known as Rockville and Fairy Land: and, in the event of default being made in payment of the sum secured by the bond, they authorised and empowered the Manager of the Bank, his successors or assigns, absolutely to sell the properties mortgaged either by private sale or public auction for the realisation of the amount due on the bond: to sign a conveyance or conveyances,

and a receipt or receipts for the consideration money: and declared that such conveyance or conveyances, receipt or receipts should be as valid as if signed by them. By a third instrument also registered and bearing the same date, the 20th July 1874, the same persons, under the same description, constituted the Manager of the Bank for the time being their true and lawful attorney for them and in their names, and as their act and deed, to sell the estates of Rockville and Fairy Land, and to do all acts necessary for effecting the premises. Default being again made in payment of the bond-debt, the Bank caused the property to be advertised for sale and eventually found a purchaser. By deed dated the 19th October 1875, which recited that at the date of the original loan Mary Victoria Read was resident in England, and had declined to continue acting as executrix, and which recited the several instruments to which reference has been made, Charles Edward Beresford described as Manager of the Bank, in exercise of the power of sale, and for the purpose of reimbursing to the Bank the moneys advanced by and due to it, in consideration of Rs. 35,000 granted and conveyed to Isabella Blackburn Brown, the plaintiff in this suit, the estate called Rockville with its appurtenances, and all the estate and interest therein of Mrs. Seale, R. E. Seale, and W. F. Seale, as executrix and executors of the testator, freed from all claims of the mortgage of the 20th July 1874, and the said Charles Edward Beresford, for the executrix and executors therein named, executed the usual covenants for title and for further assurance. When the plaintiff endeavoured in virtue of this sale to obtain possession of Rockville, she was resisted by the defendant, Alfred Leonard Seale, a son of the testator and a legatee under his will. She accordingly brought the present suit to establish her title under the sale and to recover possession of the estate.

[714] The Court of First Instance held that the deed of sale was valid, and gave the plaintiff a decree. The defendant, Alfred Leonard Seale, appealed to the High Court upon the ground, amongst others, that the executors of the will of Colonel Seale had no power to delegate their authority to sell to a third party.

The Court (STUART, C. J., and SPANKIE, J.) referred to the Full Bench the question whether the deed of sale, dated the 19th October 1875, being a deed of sale not under the hands of the executors themselves, but by and in the names of the persons to whom they delegated their authority under the power of attorney dated the 20th July 1874, was valid, and was a good and binding conveyance of the property it purported to sell.

Mr. Hill for the Appellant.

Messrs. Ross and Conlan (with them Mr. Quarry) for the Respondent.

The following **Judgments** were delivered by the Full Bench:—

Stuart, C.J.—I am of opinion that, by the power-of-attorney given by the executors to Mr. Beresford, the Manager of the Delhi and London Bank, they delegated their authority to sell to that gentleman, but that the sale to the plaintiff was and is invalid. I would therefore allow this appeal for the seventh reason assigned, and reverse the judgment of the Court below with costs. I have arrived at this conclusion after anxious consideration of the case, and of the legal principles on which its determination depends. If I have not found any decision or dictum exactly in point, there appears to be in the books the recognition and application of principles and analogies all going to show that the sale by Mr. Beresford to Mrs. Brown was not valid as against the defendant, and that therefore the judgment of the Court below ought to have been for the defendant. Viewed, indeed, in any light, the question thus before us for

decision is, in principle, a most serious one, for if what was here done was validly done, then undoubtedly executors and trustees have much larger powers than is generally understood by lawyers, while if these executors have exceeded the limits of their authority, we should be told so by the Court in the last resort. I therefore trust that this case may go further, and that the Judges of the Privy Council may have an opportunity of instructing us on [715] the subject. The case is one of pure technical law, having nothing whatever to do with the legal customs and usages of India, nor does even the Indian Succession Act, in my opinion, affect it in the slightest degree. The three documents which are material to the case are fully set out in the order of reference by Mr. Justice SPANKIE and myself : and just let us see how the case stands on these. First, there is the testator's will, in which, with the exception of charging his estate, real and personal, with the payment of all his just and lawful debts, there is no express provision for, or, indeed, any special recognition of the necessity of such a sale as we have to consider ; on the contrary, there is only one special trust to sell, and that for a totally different purpose than for the payment of debts, and appearing to show, too, that in the testator's mind at least there would be no necessity for such a sale as this so-called sale to the plaintiff, *viz.*, one for the personal benefit of one of his sons in consequence of his infirmity and inability to earn a competency, and otherwise for the benefit of the rest of his children. It is also to be considered that the debts for the payment of which the sale to Mrs. Brown was made were not debts incurred by the testator himself and left by him to be paid out of his estates, but debts incurred by the executors themselves in the course of their administration. Then we have the second document mentioned in the reference, *viz.*, the power-of-attorney by which the executors "constitute and appoint the Manager for the time being of the Delhi and London Bank, Mussoorie, our true and lawful attorney for us and in our names, and as our act and deed, to sell and negotiate the sale of the houses and property situate in Landour, &c., and to perfect all or other act or matter or thing whatsoever which shall or may be necessary or requisite for effecting the premises, we, &c., hereby ratifying and confirming whatsoever the Manager for the time being of the said Delhi and London Bank, Limited, shall lawfully do or cause to be done for us or on our behalf in or about the aforesaid premises by virtue of these presents." Here it will be observed there is no recital of the will or the discretion in it to pay the testator's debts, nor of the fact that there were any such debts existing, and of the necessity of paying those debts by means of a sale of a portion of the estate, and that such estate should be the particular property mentioned, but the Manager of the Bank is simply, and without any [716] reason assigned, directed to sell and negotiate the sale of the houses and property. There is no direction simply to make a subsidiary contract, or to receive offers, which offers are to be communicated to, and considered by, the executors, but a power to negotiate and conclude a sale, and to sell, in the largest and most unqualified sense of the term : and as if this was not enough, the instrument goes on to empower the Manager "to do and to perfect all or any other act or matter or thing whatsoever which shall or may be necessary or requisite for effecting the premises ;" that is to say, the Manager is to effect the sale on any terms he pleases, and in effect, to deal with the property directed to be sold as if he himself was an executor or trustee of the will. If this is not a delegation of their office, and, *pro tanto*, of their estate, by the executors, I cannot imagine what delegation can possibly mean. One thing is certain, that Mr. Beresford, the Manager, evidently considered it was complete so far as he was concerned, and that he had, by means of it, acquired absolute control over the property which it had been determined to sell, for he

proceeds himself, of his own authority, to sell the property, and he executes a conveyance to Mrs. Brown as if the transaction were a matter exclusively personal to him and her. This conveyance or deed of sale, no doubt, contains recitals which go to justify the arrangements to some extent as between the executors and him, but from beginning to end there is not the slightest recognition in this deed of the rights and interests under the will of the *cestui que trust* and legatees as parties and beneficiaries who are in any wise to be accounted to. The operative part of this deed of sale is remarkable as showing the merely personal character of both seller and purchaser. It is preceded by the following singular recital:—“And whereas I (the Manager) being desirous of effecting a sale, &c., under the power hereinbefore recited” (by which he means the general direction in the will to pay the testator's debts), “have for a great length of time advertised the sale in the public newspapers, and have at last received an offer, &c., of Rs. 35,000 to be paid on the execution, registration and delivery of these presents” (and of certain other instruments, none of which contained any recognition whatever of the executors, &c.), “and having communicated the offer to the said executors” (it is not stated that the executors gave any answer about the offer, or [717] in any way gave their assent to its acceptance directly or indirectly), “and being satisfied” (that is, the manager being satisfied) “that it is unlikely any higher offer for the said estate will be made, etc., etc., have decided upon accepting the said offer, and have *duly communicated my acceptance of it*” (to the purchaser, Mrs. Brown). “Now therefore know ye that I the said Charles Edward Beresford, in exercise of the said power of sale” (that is, the power of sale given by the will to the executors), “and for the purpose of re-imburſing to the said Delhi and London Bank, Limited, the moneys advanced by and due to it” (that is, the manager's own Bank), “and in consideration of the sum of Rs. 35,000 to be paid by the said Mrs. Brown” (it is not said to whom, to the executors or to Mr. Beresford himself), “do by these presents grant unto the said Mrs. Brown, her heirs and assigns all those lands, forests, and houses, and hereditaments.” It is unnecessary to go further with this deed of sale, which, it will be observed, contains not only the most absolute and complete, but the most thoroughly independent conveyance, by the Delhi and London Bank, Limited, of all the property comprised in it, and this solely in the interest of the Bank itself, and without the slightest reference to the rights of the defendant as a beneficiary under the will.

Now if all this does not amount to a delegation by these executors to Mr. Beresford not only of the control of the property and its sale, but of *their discretion* and of the *confidence* reposed in them by the will, I do not know what possible arrangement of this kind can have that effect. These executors undoubtedly, in my judgment, delegated their office, and, in doing so, took no sufficient measures, *indeed*, no measures at all, to protect the estate, and all that was done in virtue of that delegation was of course illegal, and the sale to Mrs. Brown was and is invalid. The legal estate remained in the executors, and they undoubtedly did not divest themselves of it by the power-of-attorney to the manager, and the right and title to the property remains in the executors still. Although retaining therefore complete dominion over the property under the will, and bound in all transactions relating to it to exercise their own discretion, they left everything to the discretion of their attorney, who appears to have dealt with Mrs. Brown as if the property had become his own or the Bank's independent estate. This they [718] could not do—Sugden on Powers, 8th ed., pp. 179, 180—and the result therefore is that as against the defendant Alfred Seale there has been no sale to the plaintiff.

As to s. 269^{*} of the Indian Succession Act, that enactment, as I have said, has nothing to do with the case. It relates solely to direct dealing with, or on account of, the estate by the executor or administrator himself, and not by means of delegation to any other person, or by means of any other intermediary. The case of a mortgage under this section is quite different from a sale out and out, for a mortgagor in that case retains in his own person not only the equity of redemption, but the right to pay up the debt on the contract made by it, such contract being the contract of the mortgagor himself, and not that of any delegated agent or attorney. For these reasons my answer to this reference is that the sale-deed is not a good and binding conveyance of the property it purports to sell.

Pearson and Turner, JJ., concurring.—(After stating the facts of the case as already set out, the judgment continued:) The questions addressed to this Bench we understand to be the following:—Whether the execution of the sale-deed by Mr. Beresford selling under a power of sale created by the executor of a will executed by an Englishman domiciled in India, after the Indian Succession Act came into operation, is valid, and whether, in the absence of other defects, such a conveyance operates to transfer the property sold to the purchaser. We do not understand that our opinion is sought on the question whether the deed of mortgage and the power-of-attorney are invalid by reason that Mrs. M. V. Read was no party thereto, or whether any objection on that ground is not answered by the 271st section of the Indian Succession Act, which declares that, when there are several executors or administrators, the powers of all may, in the absence of any declaration to the contrary, be exercised by any one of them who has proved the will or taken out administration. The three instruments executed on the 20th July 1874 must be regarded as parts of the same transaction. The mortgage was intended to be a collateral security for the bond. The power-of-attorney was intended to give effect to the power of sale in the mortgage. The questions then put to us resolve themselves into these: Are execu-[719]tors under a will to which the Succession Act applies competent to execute a mortgage of immoveable property, to create a power of sale in favour of the mortgagee, and to appoint the agent of the mortgagee their attorney to give effect to the power of sale.

In the case before us the testator charged his debts on his moveable and immoveable property, and in addition to this power executors have, under the Indian Succession Act, s. 269, which makes no difference between moveable and immoveable property, power to dispose of the property of the testator either wholly or in part in such manner as they think fit. It has, we are aware, been held in England that, before a power of sale has been given to executors, they cannot sell by attorney, but it has also been held by the Courts in that country that an executor may mortgage with a power of sale property which by the law of England wholly vests in him. In *Russell v. Plaice* (18 Beav. 21; 18 Jur. 254; 23 L. J., Chanc. 441), Lord Romilly, when Master of the Rolls, held that a purchaser was bound to accept an assignment of leaseholds executed by a mortgagee under power of sale created by an executor. "The power," said His Lordship, "which an executor, or administrator possesses of making a valid mortgage includes in it a power to give all that is properly incidental to that species of alienation * * *. The power of sale given to the mortgagee must be considered not as the delegation of a power intrusted to the executor, which

* [Sec. 269 :—An executor or administrator has power to dispose of the property of the deceased, either wholly or in part, in such manner as he may think fit.]

is a power to sell, for the benefit of the *cestui que trust*, but as the creation of a new power not for the benefit of the persons interested in the testator's estate, but for the benefit of the persons interested in the mortgage; it is a power to render the mortgage effectual, and the right to create that power is incidental to the authority of the executor to mortgage." In *Bridges v. Longman* (24 Beav. 27) it was held that a power to raise money by sale or mortgage authorises a mortgage with a power of sale (see also *In re Chawner's Will*, I.L.R., 8 Eq. 569). We have cited these rulings because the learned counsel for the appellant relied in support of his argument on English authorities. But the points raised must be decided by the law of India. The charge of debts on the real and personal estate would probably be held sufficient by itself to authorise a sale or mortgage by the executor for the payment [720] of debts. There is, it is true, no express devise of the estate to the executors, but there is a direction for the application of the rents and profits during the life of the testator's widow, or until her remarriage, and then a direction for sale, and it may be taken that the testator was aware that by law his estate would vest in his executors, and that he intended the powers and trusts created and declared by his will should be exercised and performed by the executors.

The respondent is not, however, constrained to rely on the charge created by the will. She is entitled to rest the validity of the sale on the power given to executors by the Succession Act, and it is impossible that any power could be conferred in larger terms. The executors may dispose of the property of the deceased "in such manner as they may think fit." This language, in our judgment, authorises an executor to execute a mortgage with a power of sale. It is true that a power of sale is unusual in mortgages made by natives of this country, but it is not an unusual power in mortgages drawn after English precedents, and executed by and in favour of Englishmen resident in India, and, if it were unusual, we are not prepared to hold, having regard to the wide language in which the power to dispose of property is by law given to executors, that a power of sale created in a mortgage by executors would be invalid. For the purpose of his office an executor is by the law of India invested with the same powers of conveying a testator's estate as the owner himself possessed. It is of course his duty to mortgage or sell the estate only when there is necessity for it. But in creating a power of sale in a mortgage he does not, as Lord Romilly pointed out, delegate the duty imposed on him. In the exercise of the discretion conferred on him he has decided that a mortgage is necessary, and as a power of sale increases the value of the security and facilitates the procuring of the required fund at the lowest rate of interest, he for the benefit of those interested under the will creates a new power to be exercised for the benefit of the mortgagee. The power-of-attorney is simply auxiliary to the power of sale and almost invariably is conferred by the same deed as the power of sale. It is not invalidated by being created by a separate instrument. We, therefore, reply that the conveyance to the purchaser is not invalid on any of the grounds suggested in the referring order.

[721] **Spankie, J.**—The executors in this case were acting under the authority vested in them by s. 269 of Act X of 1865, and not under any power of sale delegated to them as a trust by the testator relying on the exercise of their own personal discretion and judgment in effecting a sale. The power given by s. 269 of the Succession Act is unqualified. They may dispose of the property of the testator, real and personal, as they think fit. They have the same power to deal with the property that the owner himself would have had. If he could have empowered his agent or attorney to sell the whole or any portion of the property, the executors can do the same by virtue of the large authority given

to them by the Act. It would appear that we are not called upon to look to English law in replying to the reference made to us. I would say that the attorney in this case could give a valid title to the purchaser acting as he was under the authority given to him by the executors.

When the case was returned to the Division Court (STUART, C.J., and SPANKIE, J.), in disposing of the appeal, the following further observations were made by STUART, C.J., on the question referred to the Full Bench :—

Stuart, C.J.—This case was referred by us to a Full Bench as to whether the sale-deed not being under the hands of the executors, but by and in the name of the person to whom they delegated their authority under the power-of-attorney, is valid, and is a good and binding conveyance of the property it purports to sell. All the Judges consulted have now returned their opinions, and, with the exception of myself, they have answered the reference in the affirmative, that is, they are all of opinion that the sale-deed to the plaintiff is a valid conveyance of the property to her.

Having fully considered all that has been recorded by my colleagues, I regret to say that I find myself wholly unable to adopt their reasoning, and I remain of the opinion expressed by me in my judgment in the reference. I am quite clear that s. 269 of the Indian Succession Act has nothing whatever to do with this case. That section provides that “an executor or administrator has power to dispose of the property of the deceased either wholly or in part in such manner as he may think fit.” Now this is a proposition which, properly understood, it never occurred to me to controvert. But [722] the question raised in the present case is a very different one, and it is not whether any executor has power to dispose of any portion of the testator’s estate as he thinks fit, but whether he can refuse or abstain from disposing of the property himself by handing over the duty, the power, and the discretion to another party, a stranger to the estate and who as a creditor has an interest, not in its profitable or just administration, but an interest of a nature which is necessarily adverse to the interests of the legatees and others who take under the will. The Succession Act in this section appears to me to assume that the power to deal with the testator’s estate is a power that must be exercised by the executors themselves directly, and not by a person delegated or authorised by them to act on their behalf, much less a person whose only interest is to obtain satisfaction of his own claims on the estate. As to the case of a mortgage, I have sufficiently expressed my opinion at the conclusion of my answer to the reference.

I may now add that, my attention having been directed by one of my colleagues to the fact, that there is evidence by letters addressed by one of the Seales to the Manager of the Bank showing that the family were extremely anxious to save the property in 1874 and 1875, and that a proposal for the management of the estate in the interest of all concerned was made, and that this proposition was in due course communicated to the Directors of the Bank in London—not a very competent body one would imagine to decide such a question—but that these gentlemen declined to entertain the offer, thinking no doubt more about the assets of the Bank and their responsibility to account for them than of any considerations or favour to the appellant’s family being allowed a chance of saving the property. Be that as it may, the fact that the family were willing at the last moment to prevent the sale, adds considerable force, I think, to my contention that Mr. Beresford had no authority to exercise the power and the discretion reposed in the executors, and that neither could the executors place

him in such a position, nor, if they did so place him, could he legally and effectually accept such authority at their hands, so as of himself to give a good title to the plaintiff as purchaser.

I also desire to point out that I never suggested that the bond to the Bank was executed for the purpose of discharging private [723] debts personal to the executors themselves. What I meant to convey was that the debt to the Bank had been incurred, not by the testator himself, but by the executors in the course of their administration of the estate; and although they could have sold the property themselves, that is, by a deed of sale under their own hands, subject to their liability afterwards to account for the transaction to the defendant or others concerned, they could not delegate or otherwise transfer the power to do so to a stranger, much less to a creditor of the estate, and who had become such by means of their own administration.

In my judgment in the reference I referred to, although I did not quote from, the well-known work of Sugdon on Powers, but I had better give the words of that great authority. In the chapter (Ch. vi, 8th ed., pp. 179, 180) on the "Transfer of Powers," the learned author lays down the law as follows:—

"Wherever a power is given, whether over real or personal estate, and whether the execution of it will confer the legal or only the equitable right on the appointee, if the power reposes a personal trust and confidence in the donee of it, to exercise his own judgment and discretion, he cannot refer the power to the execution of another, for *delegatus non potest delegare.*" Therefore, where a power of sale is given to trustees or executors, they cannot sell by attorney. So where a father had a power of appointment to his children over a real estate, and he delegated the power to his wife, Lord Hardwicke said that this must be considered as a power of attorney which could be executed only by the husband, to whom it was solely confined, and was not in its nature transmissible or delegatory to a third person. Again, where personal estate was given to such charitable use as I should appoint, and he directed the money to be applied as B should appoint, Lord Hardwicke held the delegation void. So where a testator gave his wife a power to appoint personally amongst their children, and she delegated this power by her will to others, Sir Thomas Clarke determined that the delegation was void; and this is now a settled point. On the same ground a person whose consent is made requisite to the due execution of a power, cannot authorise another as his attorney to consent to any execution of it. This is doctrine, the application of which to the present case derives increased force from the fact to which I have already alluded, that the donee of the power was a [724] creditor and claimant against the estate for which the executors were responsible, and had therefore a direct interest opposed to that of the legatees and beneficiaries under the will. On the other hand the author points out that it is the delegation of the *confidence and discretion* reposed in executors and other donees of powers that the law refuses to recognise. He says: "It is frequently contended in practice that the donee of a power cannot execute a deed of appointment by attorney. But the cases by no means authorise this position. They merely establish that the donee cannot delegate the *confidence and discretion* reposed in him to another. Where the deed of appointment is actually prepared, or the donee points out the precise appointment which he is desirous should be made, there no confidence, no discretion, is delegated. The appointment is in every respect an exercise of his own judgment, and there cannot be any reason why he should not be permitted to execute the *deed of appointment* by attorney (at p. 180)." The meaning of this as applied to the present case is simply that, where the executors or donees themselves make the contract, its execution and completion by

deed may be by attorney; that attorney, however, exercising no confidence or discretion or judgment, but merely being the agent or officer deputed to carry the contract already made into effect. Now, in the present case everything was left to Mr. Beresford, the confidence and discretion of the executors was delegated or transferred to him, and he was left to his own judgment to make such bargain as he thought fit for the sale of the estate, a state of things which, if countenanced by any authoritative reading of the law, would, it is easy to understand, lead to the most pernicious consequences.

On all these grounds my judgment is that the sale to the plaintiff was and is wholly illegal. But the Judges consulted in the reference being differently minded, we must for the present hold, as matter of law, that the executors acted within their powers, that therefore the Manager of the Bank acted within his, and that the plaintiff has got a good title to the estate.

It only now remains for me to notice the reasons of appeal in the original memorandum. (The learned Judge then proceeded to dispose of the remaining grounds of appeal.)

[726] APPELLATE CIVIL.*The 27th May, 1878.*

PRESENT :

MR. JUSTICE TURNER, OFFICIATING CHIEF JUSTICE, AND
MR. JUSTICE SPANKIE.

Afzal-un-nissa.....Plaintiff

versus

Tej Ban.....Defendant.

Improper reception in evidence of unstamped document—Irregularity not affecting the merits of the case—Appeal—Act VIII of 1859 (Civil Procedure Code), s. 350.

Where a Court of First Instance, treating an unstamped promissory note, the after stamping of which was inadmissible, as a bond, received such instrument in evidence, on payment of the stamp duty chargeable on it as a bond and of the penalty, held that the reception of such instrument by such Court, being an irregularity not affecting the merits of the case, was no ground for reversing the decree of such Court when the same was appealed from. †

THIS was a suit for certain money due on a promissory note, dated the 1st May 1874. This instrument, although chargeable, under Act XVIII of 1869, with the stamp duty of fifteen annas, was unstamped. The Court of First Instance, treating the instrument as a bond, allowed the plaintiff, in the exercise of the powers given to it by s. 20 of Act XVIII of 1869, to pay the stamp duty chargeable on the instrument as a bond and a penalty, and received the instrument in evidence, and gave the plaintiff a decree. On appeal by the defendant, the lower Appellate Court reversed the decree of the Court of First Instance and dismissed the suit, on the ground that after stamping of the instrument was inadmissible, and it could not be received in evidence.

The plaintiff appealed to the High Court, contending, amongst other matters, that, with reference to s. 350 of Act VIII of 1859, the lower Appellate Court had erred in reversing the decree of the Court of First Instance on account of an irregularity not affecting the merits of the case or the jurisdiction of the Court.

[726] Munshi Hanuman Prasad and Pandit Bishambhar Nath for the Appellant.

Mr. Howard and Shah Asad Ali for the Respondent.

The Judgment of the Court was delivered by

* Second Appeal, No. 1244 of 1877, from a decree of W. Lane, Esq., Judge of Moradabad, dated the 18th September 1877, reversing a decree of Muhammad Wajih-ul-lah Khan, Subordinate Judge of Moradabad, dated the 29th April 1877.

† As to whether the reception in evidence by a Court of First Instance of an unstamped document is ground for interference with the decree of such Court on appeal, see *Hur Chunder Ghose v. Woona Soondaree Dassee*, 28 W. R. 170; *Srinath Saha v. Saroda Cobindo Chowdhury*, 5 B. L. R., Ap. 10.; *Lalji Singh v. Syad Akram Ser*, 3 B. L. R., A.C., 235, S.C., 12 W. R. 47; *Currie v. S. V. Muth Ramen Chetty*, 3 B. L. R., A.C., 126, S.C., 11 W. R., 520; *Curness v. Sheocharn Sahoo*, W. R., 1864, p. 184; *Crawley v. Maling*, 1 Agra H. C Rep. 63; *Adinarayana Setti v. Minchin*, 3 Mad. H. C. Rep. 297.

Turner, Offg. C.J.—The document could not be received in evidence on payment of any penalty (*see s. 28 of Act XVIII of 1869* and *Nandan Misser v. Chatterbati*, 13 B. L. R., Ap. 38). It should not then have been received in evidence, but it having been admitted by the Court of First Instance, the lower Appellate Court was not justified in reversing the decree of the Court of First Instance and dismissing the suit, for the irregularity did not affect the merits. The decree of the lower Appellate Court cannot be supported on the ground on which it proceeds. The appeal to the Judge must then be tried on the merits, and if, as the appellant alleges, and as she proved to the satisfaction of the Court of First Instance, the note was given to induce the appellant to consent to the mutation of names, the consideration is sufficient, and the appellant will be entitled to a decree. The costs of this appeal will abide and follow the result.

Cause remanded.

NOTES.

[See sec. 36 of the Stamp Act of 1899. Similar rulings were given in the following cases:—(1889) 13 Bom. 449; (1885) 12 Cal. 64; (1882) 5 Mad. 220.]

[1 All. 728]

APPELLATE CIVIL.

The 14th June, 1878.

PRESENT:

MR. JUSTICE TURNER, OFFICIATING CHIEF JUSTICE, AND
MR. JUSTICE PEARSON.

Tetley Judgment-debtor
versus .

Jai Shankar and another Decree-holders.

Interlocutory Order—Appeal to Her Majesty in Council—Act VI of 1874—Act X of 1877 (Civil Procedure Code—Letters Patent), cl. 31.

Held that the High Court has not any power, under Act X of 1877, or cl. 31 of the Letters Patent, to grant leave to appeal to Her Majesty in Council from an order of the Court remanding a suit for retrial.

The provisions of cl. 31 of the Letters Patent are repealed by the Code and Act VI of 1874 which preceded it.

THIS was an application to a Division Court of the High Court for leave to appeal to Her Majesty in Council against an order of such Division Court, dated the 23rd January 1878. This was an order, under s. 562 of Act X of 1877, remanding a case to the Court of First Instance for a new trial. The order was made under these circumstances: The Court of First Instance dismissed an [727] application for the execution of a decree made under the provisions of s. 53 of Act XX of 1866, on the preliminary point of limitation. On an appeal being preferred to the High Court by the decree-holders, the Division Court referred the point of limitation to the Full Bench. The Full

Application No. 6 of 1878, for leave to appeal to Her Majesty in Council.

Bench held that the application was not barred by limitation (see *ante* p. 586), and the case was accordingly remanded by the Division Court to the Court of First Instance for disposal on its merits.

Mr. Colvin for the Applicant.

Munshi Sukh Ram for the opposite parties.

The Judgment of the Court was delivered by

Turner, Offg. C.J.—It is clear that, under the provisions of the Procedure Code, X of 1877, we have no power to give leave to appeal from the order of this Court directing a hearing on the merits, that order not being a decree but an interlocutory order; but it is argued that we have discretion to allow an appeal under the 31st clause of the Letters Patent. The case appears to be one in which, if we possessed the power, we should be inclined to exercise it, but we are of opinion that the provisions of that clause were by implication repealed by the Code and Act VI of 1874, which preceded the Code. The petitioner must apply for special leave or wait until this Court pronounces final judgment if the proceedings are brought before it. Each party to bear his own costs of this application.

Application refused.

NOTES.

[See (1907) P. R. 52.]

[1 All. 727]

APPELLATE CIVIL.

The 3rd June, 1878.

PRESENT:

MR. JUSTICE PEARSON AND MR. JUSTICE OLDFIELD.

Manik Singh.....Defendant

versus

Paras Ram.....Plaintiff.^{*}

Sale in execution of decree—Surplus sale-proceeds lien—Act VIII of 1859.
(Civil Procedure Code), s. 271.

Certain immoveable property was attached on the 13th April 1876, in execution of the two decrees, *riz.*, *M's*, dated the 15th January 1876, which declared a lien created by a bond dated the 17th July 1873, and *I'rs*, dated the 21st January 1876, which declared a lien [728] created by a bond dated the 28th September 1875. *M* had another decree dated the 11th November 1875, declaring a lien on the same property created by a bond dated the 27th October 1874. On the 2nd June 1876, before the sale of the property, *M* applied for the attachment in the execution of that decree of the surplus remaining from the sale-proceeds after his claim under the decree dated the 15th January 1876, was satisfied in full. The

* Second Appeal, No. 376 of 1878, from a decree of Maulvi Sayyid Farid-ud-deen Ahamad, Subordinate Judge of Aligarh, dated the 5th February 1878, modifying a decree of Munshi Kishen Dayal, Munsif of Jathras, dated the 6th September 1877.

Court made an order in accordance with his application. Held that, under such circumstances, *M*, as the holder of the decree, dated the 11th November 1875, was entitled to share in the surplus sale-proceeds under the provisions of s. 271 of Act VIII of 1859, and further was entitled to share before *P*.

ON the 15th January 1876, one Manik Chand obtained a decree for money against two persons named Duli Chand and Jugal Kishore, which declared a lien on certain immoveable property created by a bond dated the 17th July 1873. On the 21st January 1876, one Paras Ram obtained a decree for money against the same persons, which declared a lien on the same property created by a bond dated the 28th September 1875. On the 13th April 1876, the property was attached in the execution of both these decrees. At this time Manik Chand held a decree for money against the same persons, dated the 11th November 1875, which declared a lien on the same property created by a bond dated the 27th October 1874. On the 2nd June 1876, he made an application to the Court in which he stated that the property was advertised for sale on the 20th June 1876, in the execution of the decree dated the 15th January 1876, and prayed that the surplus of the sale-proceeds remaining after the satisfaction of that decree might be attached in execution of the decree dated the 11th November 1875, and be paid to him. On the 3rd June 1876, the Court made an order directing the officer conducting the sale to attach in execution of the decree dated the 11th November 1875, the surplus remaining from the sale-proceeds after the claim under the decree dated the 15th January 1876 was satisfied in full. The property was sold on the 20th June 1876. On the 22nd August 1876, the Court ordered the claims of Manik Chand under the decrees dated the 15th January 1876, and the 11th November 1875, to be satisfied in full from the sale-proceeds, and the surplus remaining to be paid to Paras Ram under the decree dated the 21st January 1876.

The present suit was brought by Paras Ram to recover from Manik Chand a portion of the money paid to him under this order [729] on the ground that the plaintiff, as an attaching creditor, was entitled to have his claim under the decree, dated the 21st January 1876, satisfied in full. The Court of First Instance dismissed the suit, holding that the defendant's claims under the decrees, dated the 15th January 1876 and the 11th November 1875, ought to be satisfied in full in preference to the plaintiff's claim under his decree. On appeal by the plaintiff, the lower Appellate Court gave him a decree for the amount which had been paid to the defendant under the order of the 22nd August 1876, in satisfaction of his claim under the decree dated the 11th November 1875, on the ground that neither attachment nor sale had been made under that decree.

The defendant appealed to the High Court against the decree of the lower Appellate Court.

Babu Oprokash Chandar Mukarji and Jogindro Nath Chaudhri for the Appellant.

Munshi Hanuman Prasad and Pandit Bishambhar Nath for the Respondent.

The Judgment of the Court was delivered by

Pearson, J.—The sale was made on the 20th June 1876, in execution of the defendant-appellant's decree dated 15th January 1876, which declared a lien created by a bond, dated 17th July 1873, in pursuance of an attachment made by him on 13th April 1876, on which date the plaintiff, respondent, also attached the same property in execution of his decree dated 21st January 1876,

which declared a lien dated 28th September 1875. Both Courts are agreed that it was proper that the defendant-appellant's decree above-mentioned should first be discharged out of the sale-proceeds. Defendant-appellant had another decree, dated 11th November 1875, declaring a lien on the same property created by a bond dated 27th October 1874; the Court of First Instance held that this decree should also be discharged out of the surplus sale-proceeds in preference to that of the plaintiff—respondent; the lower Appellate Court held otherwise for the reason stated in its judgment, *viz.*, that neither attachment nor sale had been made under the decree of 11th November 1875.

But it appears that on 2nd June 1876, the defendant preferred a petition to the Court praying that, as the property on which [730] his decree of 11th November 1875, declared his lien was about to be sold in execution of his decree, dated 15th January 1876, the surplus sale-proceeds might be attached for the purpose of being applied to the satisfaction of the decree of 11th November 1875, and that an order was passed on 3rd June 1876, in accordance with the petition.

Under the circumstances we are of opinion that the decree-holder of 11th November 1875 was entitled to share in the sale-proceeds under the provisions of s. 271 of Act VIII of 1859, as one who had prior to an order for distribution, before the sale even, taken out execution of his decree against the same judgment-debtor and not obtained satisfaction thereof; and as his lien as well as the decree which declared it were prior in date to the lien and decree held by the plaintiff, was entitled to share before him.

We therefore decree the appeal with costs, modifying the lower Appellate Court's decree so far as it modified that of the Court of First Instance, and restoring the latter in its entirety.

Appeal allowed.

[1 All. 730]
APPELLATE CIVIL.

The 21st June, 1878.

PRESENT:

MR. JUSTICE TURNER, OFFICIATING CHIEF JUSTICE, AND
MR. JUSTICE OLDFIELD.

Mercer.....Judgment-debtor
versus

Narpat Rai and another.....Decree-holders.*

Execution of decree--Military officer—Stat. 40, Vict., c. 7 (Mutiny Act, 1877), s. 99.

Where, with reference to s. 99 of the Mutiny Act, a decree for money made against a military officer serving in India directed that the judgment-debt should be stopped out of a moiety of such officer's pay, held that the decree-holder could not obtain satisfaction of the decree by attachment of such officer's moveable property.†

THE judgment-debtor in this case was an officer belonging to Her Majesty's Royal Artillery serving in Allahabad. The decree, [731] which was dated the 1st June 1877, was a decree for money made by a Civil Court in the Punjab. It specially directed, with reference to s. 99 of Stat. 40 Vict., c. 7 (The Mutiny Act, 1877), that the judgment-debt should be stopped and paid to the judgment-creditor out of a moiety of any pay coming to the judgment-debtor in the current month or any future months. This decree was sent for execution by the Court which made it to the District Court at Allahabad. In execution thereof certain moveable property belonging to the judgment-debtor was attached in his residence at Allahabad. The judgment-debtor objected to this attachment on the ground that the decree did not award execution thereof generally. The Judge of the District Court made an order disallowing the objection on the ground that it was one to be urged before the Court which made the decree and not before him.

The judgment-debtor appealed to the High Court against the order of the District Court.

Mr. Spankie, for the Appellant, contended that the District Court was bound to consider whether or not the decree was being executed according to its terms; that the decree, which was made in view of s. 99 of the Mutiny Act, only authorized the stoppage of the judgment-debtor's pay, and that consequently, under the provisions of that section, the judgment-creditor could not take out execution of the decree against the property of the judgment-debtor.

The Junior Government Pleader (Babu Dwarka Nath Banarji) for the Respondent, contended that the fact that the decree directed the pay of the

* Miscellaneous First Appeal, No. 27 of 1878, from an order of J. W. Quinton, Esq., Judge of Allahabad, dated the 2nd May 1878.

† In *Bansi Lal v. Mercer*, H. C. R., N.-W. P., 1875, p. 381, it was held that, where no provision had been made in a decree for the stoppage of the pay of a military officer, the pay of such officer could not be attached in the execution of the decree in the hands of the Pay-master.

judgment-debtor to be stopped, did not debar the judgment-creditor from taking out execution against the property of the judgment-debtor under the Code of Civil Procedure.

The Judgment of the Court was delivered by

Turner, Offg. C. J.—The Judge of Allahabad, in receiving the application for execution, was bound to consider whether there was anything to prevent execution in the manner prayed. At the time the decree was passed the decree-holder obtained an order from the Court which passed the decree for the satisfaction of the decree by stoppage of half the defendant's pay. So long as that order subsists the decree-holder cannot obtain satisfaction of his decree by attachment, for it is clear to us that the decree-holder is not as [732] against officers to whom the Mutiny Act is applicable, entitled to both remedies at once. The object of the Act is to prevent public servants whose services may be urgently required from being incapacitated to discharge such services. The appeal is decreed and the order of the Judge discharged with costs.

Appeal allowed.

[1 All. 732]

CIVIL JURISDICTION.

The 28th June, 1878.

PRESENT :

MR. JUSTICE TURNER, OFFICIATING CHIEF JUSTICE, AND
MR. JUSTICE PEARSON.

Kanhaiya Lal.....Plaintiff

versus

Domingo and another.....Defendants.*

Promissory note -Assignment of chose in action -Form of suit by Assignee—Act IX of 1872 (Contract Act), s. 62.

Held, where a promissory note made payable simply to the payee without the addition of the words order or bearer, and therefore not negotiable, was assigned to a third person, that the assignee could sue upon such note, a chose in action being by the law of India assignable, and that the assignee could sue in the Courts of India in his own name.

THIS was a reference to the High Court, under s. 617 of Act X of 1877, by Mr. G. E. Knox, Judge of the Court of Small Causes at Allahabad.

The question referred by the Judge was the following :—“Can a person, who has acquired by purchase for valuable consideration all the rights of a promisee in a promissory note, without notice given to the promisor, sue the

* Reference, No. 8 of 1878, from G. E. Knox, Esq., Judge of the Court of Small Causes at Allahabad, dated the 1st June 1878.

promisor for the balance due upon such promissory note?" The facts of the case out of which this question arose were stated by the Judge to be as follows:—

"On the 7th April 1876, W. Domingo, one of the defendants in the present case, executed a promissory note in favour of Lala Gur Prasad, the second defendant, payable on demand. On the 7th April 1878, Gur Prasad had sold all his right and interest in the promissory note to the plaintiff, Kanhaiya Lal, without giving notice of the sale to W. Domingo. These facts are admitted, and it is also conceded that since the sale W. Domingo has not in any way assented to the transfer, and only became aware of it on being asked [733] for the balance due. The plaintiff now sues both W. Domingo and Gur Prasad; and W. Domingo raises this plea (among others) that there was no privity of contract between him and Kanhaiya Lal.

"I am aware that the Calcutta High Court has held that the true holder of a negotiable document (and they held a promissory note to fall under that head) may at all times, if so minded, endorse the note to another with the express object of suing on it (*Ram Lal Mookerjee v. Haran Chandra Dhar*, 3 B. L. R., O. C., 130); and that by English equity law promissory notes may be assigned by separate deed (*Richardson v. Richardson*, L. R., 3 Eq., 686). Still the ruling in the Calcutta High Court was given prior to the passing of Act IX of 1872, and I feel doubtful whether s. 62 of that Act does not affect the power of a creditor to assign a debt without his debtor's consent.

"Mr. Cunningham, in his Commentaries on the Indian Contract Act, appears to suggest that the words of s. 62 govern the present case. But, with all due deference to that learned commentator, it does not seem necessary to follow that, if the parties to a contract agree to substitute a new contract for it, in that case the original contract need not be performed. It is also true that, if one of the parties to a contract enter into a subsidiary contract with a third party, then the original contract need no longer be performed. Still both this section and the illustration (c) point rather to the inference that in this case Gur Prasad and Kanhaiya Lal ought to sue as co-plaintiffs and not in the present form.

"It is easy to concede that the power of transfer might be abused as the defendant in his other pleas alleges. He further urges the principle contained in s. 232^{*} of Act X of 1877. This section has suggested the present defence. It is of course inapplicable to this case, but the plea raised by him would still, I believe, hold good in English common law.

"These doubts compel my making the present reference. In spite of them, I do not hold that s. 62, Act IX of 1872, lays down the law in this present case, and, in the absence of any special provision, the Court is bound to follow the general rules of equity. I am of opinion that a suit by the plaintiff will lie, but that it would have been more regular for him to have sued with Gur Prasad as [734] co-plaintiff excepting always the case of Gur Prasad being unwilling."

* [Sec. 232:—If a decree be transferred by assignment in writing or by operation of law Application by transferee from the decree-holder to any other person, the transferee may apply for its execution to the Court which passed it; and if that of decree. Court thinks fit, the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder:

Provided that where the decree has been transferred by assignment, notice in writing of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to such execution:

Provided also that where a decree against several persons has been transferred to one of them, it shall not be executed against the others.]

The Court delivered the following

• **Judgment:**—The promissory note is not made payable to any other person than the payee. It is not made payable to "order," nor to "bearer." It is therefore not a "negotiable instrument." Nevertheless by the law of India a chose in action is assignable. Courts of Equity allow an assignee of a chose in action to sue in his own name, and inasmuch as our Courts are Courts of Equity as well as of Law, in our judgment an assignee of a chose in action is entitled to sue in his own name. It is, however, requisite for the Courts to bear in mind that whatever defences might be set up against the assignor may also be set up against the assignee, or at least such defences as might have been set up, up to the time when notice of the assignment was given to the defendant. The Judge of the Small Cause Court may be informed accordingly.

NOTES.

[STATUTORY PROVISION—

The Transfer of Property Act, 1882 (as amended by Act II of 1900) has a chapter on 'actionable claims,' which contains express provisions on this subject. See also (1888) 13 Bom. 42; (1905) 28 Mad. 544; (1907) P. R. 9.]

[1 ALL. 734]

APPELLATE CIVIL.

The 3rd July, 1878.

PRESENT :

MR. JUSTICE PEARSON AND MR. JUSTICE OLDFIELD.

Rudr Narain Singh Plaintiff

versus

Rup Kuar and another Defendants.*

Hindu Law—Gift of separate property to Hindu widow—Stridhan—Widow's power of alienation—Reversioner—Mitakshara—Res judicata.

C, a Hindu subject to the Mitakshara law, died leaving a widow *R*, but no issue. In his lifetime he had transferred to *R*, by gift mauza *R*, a portion of his real estate. After his death *J* and *P*, his brothers, sued *R* for the possession of *C*'s real estate on the ground that it was ancestral property. Their suit was dismissed, it being held by the Sunder Court that *C*'s real estate was separate property, to which his widow would be entitled to succeed by inheritance. The Sunder Court determined that *R* had acquired mauza *R* by gift from *C*, and that *R* took under the gift a life-interest in the property only. *J* and *P* having died, *R* made a gift of mauza *R* to her agent as a reward for his faithful services. *N*, the son of *J*, sued, as the heir of his uncle *C*, to set aside this gift to the agent as illegal.

Held that the decision in the former suit did not make the question as to the interest *R* took under the gift from her husband *res judicata*, inasmuch as *N* did not claim through his father when suing as heir to his uncle.

*First Appeal, No. 6 of 1878, from a decree of Maulvi Sultan Hasan Khan, Subordinate Judge of Gorakhpur, dated the 30th November 1877.

[735] Held also, on the finding that R had acquired the property from her husband by gift, that she did not take an absolute interest in the property under the gift, and her husband's heirs could question the validity of the gift to the agent.

Held also that the gift to the agent, being made only out of motives of generosity, was invalid.

ONE Raja Chait Singh died in the year 1849, leaving two widows, Rani Rup Kuar and Gulab Kuar, but, no issue. At his death his name stood recorded in the revenue registers as the sole proprietor of certain mauzas, and as co-proprietor with his two brothers, Jagan Nath Singh and Partab Singh, of certain other mauzas. Shortly before his death he had transferred to Rup Kuar by sale and by gift certain of the mauzas of which he was recorded the sole proprietor. His widows having taken possession of his estate and alienated portions of it, Jagan Nath Singh and Partab Singh sued them and the persons to whom these alienations had been made for possession of the estate and to set aside the alienations. The plaintiffs in this suit based their claim on the allegation that Chait Singh's estate was ancestral property to which they were entitled to succeed as his heirs to the exclusion of the widows, and that the widows were only entitled to maintenance. The defendants Rup Kuar and Gulab Kuar set up as a defence to the suit, among other things, that the mauzas of which Chait Singh was recorded as the sole proprietor were not ancestral property, but his separate property, certain of them having been acquired by Chait Singh in 1804 under a gift from one Jain Kuar, and the others being self-acquired property; and that there had been a partition of the mauzas in respect of which Chait Singh's name stood recorded as a co-proprietor, and Chait Singh held his share in those mauzas as his separate property. The Principal Sudder Amin who tried the suit held that the gift by Jain Kuar to Chait Singh was invalid, and that the mauzas included in that gift, as also the mauzas which were alleged by the widows to be Chait Singh's self-acquired property, were ancestral property. The Judge further held that the transfers to Rup Kuar by sale and by gift by Chait Singh should be maintained to the extent of his interest, viz., one-third, and that the mauzas in respect of which Chait Singh's name stood recorded as a co-proprietor had been divided, and Chait Singh's shares therein were his separate property. A decree was [736] given to the plaintiffs in accordance with the above rulings in respect of the mauzas of which Chait Singh was recorded as the sole proprietor, and the rest of their claim was dismissed.

Both parties appealed to the Sudder Court. Gulab Kuar having died, an appeal was preferred by Rup Kuar alone. The Sudder Court held, on the 7th July 1852, that the gift by Jain Kuar was valid, and that the mauzas therein mentioned and the remaining mauzas recorded as the sole property of Chait Singh were his separate property, and the suit was wholly dismissed. The Sudder Court did not determine whether the transfers by sale and gift by Chait Singh to Rup Kuar were valid or not, nor did it take any particular notice of the alienations made by the widows.*

The plaintiffs applied on the 7th May 1864 for a review of the Sudder Court's judgment. † Rup Kuar did not appear to oppose the application, but the other defendants appeared and objected, among other things, that

* The Sudder Court's judgment will be found fully reported in S. D. A. Rep., N.-W. P., 1852, p. 290.

† The proceedings taken in review of judgment and the Sudder Court's judgment passed on the 30th August 1865, in review of its former judgment will be found fully reported in S. D. A. Rep., N.-W. P., 1865, p. 111.

the proprietary rights of the plaintiffs had been confiscated by the Government in consequence of their misconduct in the disturbances of 1857 and 1858, and they were consequently not competent to impugn alienations made by the widow, and that, as one or more of the mauzas alienated by the widow had been given to her by her husband in his lifetime, and did not descend to her by inheritance from him, she was free to dispose of them as she pleased. The Sudder Court admitted the review, observing, with reference to its omission to determine whether the sale and gift made by Chait Singh in Rup Kuar's favour were valid or not, and to notice the alienations made by Rup Kuar, as follows :—

"The Court's decision certainly assumes, without distinctly ruling, that a widow who succeeds her husband in a separate estate has an absolute unfettered right therein; and a review of it is sought mainly on the ground that such a doctrine has been declared to be erroneous by the Full Bench decision of the 6th July 1863, in the case of *Myna Bai v. Bhugwan Deen*, No. 114 of 1859, which rules that she only possesses a life-interest and a restricted right in such an estate, and is incompetent to alienate any part of it except for specific purposes of a pious or necessary kind. (This case is reported in S. D. A. Rep., N. W.-P., 1863, vol. ii, p. 15). Considering the ground above [737] mentioned to be a good and sufficient ground for a review, we, on the 5th December last, directed the notices required by s. 378 of the Procedure Code to be served on the opposite parties. It appeared to us that, according to the Hindu law, as expounded in the decision of the 6th July 1863, the plaintiffs may be entitled to be regarded as the reversioners of their brother's estate after his widow, and as competent to impugn transfers made by her, and that an adjudication on the question of the validity of the deeds of gift and sale executed in her favour might be necessary."

With reference to the objections of the defendants it observed as follows :—

"We disallow the second objection, because it is a doubtful question whether the confiscation included the contingent and reversionary rights of the plaintiffs, and one to be settled between them and the Government, but with which the objectors have no great concern.

"We disallow the fourth objection, because without now discussing the subject of the validity of the alleged deed of gift, we note that, according to Hindu law, property given by a husband to his wife is termed her *stridhan*, and, if immoveable, cannot be alienated by her."

At the rehearing of the appeal the Sudder Court laid down the following points for consideration :—

(1) "Whether the alienations of property made by the female in favour of the male defendants are valid or not.

(2) "Whether the plaintiffs are entitled to be regarded as reversioners of their brother's estate after his widow's death, and as competent to impugn transfers thereof made by her.

(3) "Whether an adjudication on the validity of the deeds of gift and sale executed in her favour by him is necessary."

The judgment of the Sudder Court on these points was as follows :—

"It appears that mauzas Gundha and Saondha are two out of ten mauzas which the Raja, shortly before his decease, transferred to Rup Kuar by a deed of sale; and that she on the 15th September 1849, mortgaged one-half of the latter mauza to Surbu Prasad, and on the 12th March 1850, sold the former for Rs. 8,000 to Ram Partab. The fourth objection made to the plaintiffs' application by the male defendants on the 19th ultimo was inaccurate besides, being, for the reason then noted by us, untenable under Hindu law; but they now argue more plausibly that the mauzas transferred to the female defendant by sale had, in consequence of that sale, ceased to belong to the Raja before his death, and therefore form no part of his estate to which the plaintiffs can claim to succeed as next heirs after his widow's death. The plaintiffs

alleged in their plaint that the aforesaid sale was purely nominal and fictitious, having been made without [738] consideration, and not having been followed by any real delivery. The question raised by that allegation was one on which the Courts did not enter, holding, as they apparently did, that a Hindu widow succeeding her husband in a separate estate was competent to alienate it at pleasure. Under the recent construction of Hindu law propounded in the Full Bench decision of the 6th July 1863 (S. D. A. Rep., N.-W. P., 1863, vol. ii, p. 15), that question would call for decision, but the defendants contend that such question is precluded in this case by the principle of the ruling of the Full Bench of the 24th January last in the case No. 1244 of 1864, *Sologna v. Ram Soochit Tewaree* (S. D. A. Rep., N.-W. P. 1865, p. 52), inasmuch as the sale in question and the receipt of the sale-consideration were admitted by the Raja in a suit instituted by Rup Kuar on the basis of the sale-deed, and decided in her favour accordingly. The ruling in the precedent above quoted is 'that a Hindu, who is absolute owner of a divided share of real property, is competent to create a charge upon it in the shape of a mortgage, though no sum, by way of binding the lien, has been received by him, if he have deliberately admitted the incumbrance, and that his reversioners are incompetent to have the conveyance charging the estate set aside, except on grounds which he might himself allege in an action to avoid the same.'

"The plaintiffs plead that the precedent is inapplicable, because they do not seek to avoid wholly the transfer, but only insist that it should be viewed as a gift. But we observe that in so insisting they are taking ground which the Raja himself could not have taken. He was competent to sell the mauzas to his wife, but he could not, after having acknowledged the sale and the receipt of the sale-price, allege, in an action to avoid the sale, that the transaction had been not a sale but a gift. Consequently, the Rani is entitled to any advantage which may accrue from the transaction being regarded as a sale rather than as a gift. That advantage is that she has the power of alienating the property so acquired by her, a power which under Hindu law she does not possess in respect of property received by gift or inherited from her husband. It is quite possible that, in making over to her some mauzas by deed of sale, and others by deed of gift, he intended her to have absolute control over the first to the exclusion of all other heirs, and a limited control over the second without detriment to those heirs. As in the precedent above quoted, the mortgage-lien was held to be binding under the circumstances, even though the mortgage-consideration should not have been received, so in the present case the sale cannot be disputed, even though the sale-price should have been remitted. The conveyance might, indeed, it would seem, have been made in another form, which would have had the same effect as a sale-deed without being obnoxious to discussion as to consideration. Possibly an instrument not only giving her the mauzas, but authorising her to give away or sell the same, would have been sanctioned by the ruling in the precedent case, No. 91 [739] in ch. viii, p. 238, vol. ii, Macnaughten on Hindu Law, the mauzas in question being self-acquired property, some of those, namely, which he had purchased when sold for arrears of revenue in 1817. We come therefore to the conclusion that the ten mauzas sold to the female defendant by her husband are not any part of his estate, but her absolute property, and that the sale by her to Ram Partab of mauza Gundha, and the mortgage of one-half of mauza Saondha to Surbu Prasad, are not liable to be impeached by the plaintiffs, who have title, however, to be regarded as the reversioners after her death of other mauzas received by gift or inherited by her from the deceased Raja, and are competent as such to impeach any transfer thereof to other parties.

"We have thus disposed of the two first questions which we proposed to consider, and as regards the third have decided that the validity of the sale-deed in question cannot under the circumstances be questioned. Nor need the validity of the deed of gift be discussed, as it is immaterial to the plaintiffs whether it be valid or not, seeing that the mauzas conveyed by it would devolve on the widow by the Hindu law of succession, by reason of their having belonged exclusively to her husband."

"With these remarks, which obviate any risk of injury to the plaintiffs' reversionary rights from the Court's former decision, we affirm that decision as regards the dismissal of their claim,

and order the parties to pay each the costs which they may respectively have incurred in connection with this review of judgment."

On the 15th October 1876, Jagan Nath Singh and Partab Singh having meantime died, Rup Kuar transferred by deed of gift to Chandi Prasad mauza Ranipur, one of the mauzas which Chait Singh had transferred to her by gift.

The present suit was instituted in the Court of the Subordinate Judge of Gorakhpur, on the 28th August 1877, by Narain Singh, one of the two sons of Jagan Nath Singh, against Rup Kuar and Chandi Prasad, to set aside this gift, on the ground that the property was the ancestral property of Chait Singh, Jagan Nath Singh, and Partab Singh, and the gift was made without consideration and without legal necessity.

From the plaintiff's written statement it appeared that he based his right to maintain the suit on the judgment of the Sudder Court in the suit brought against Rup Kuar and Gulab Kuar by Jagan Nath Singh and Partab Singh. He alleged in his written statement as follows:—

"She (the defendant, Rup Kuar) is trying to waste the property through enmity, so that no property might remain for the plaintiff after her death. [740] She has, with that intention, without any consideration and without any lawful necessity, made a gift of mauza Ranipur, yielding a profit of Rs. 900, in favour of the second defendant, her karinda. This gift is calculated to cause serious injury to the plaintiff. A transfer like this is illegal, both according to the shastras and legal enactments. The plaintiff, who is the heir of the defendant's husband, has the right of instituting a suit for the cancellation of the transfer made by her."

In his written statement filed on the 28th September 1877, Chandi Prasad, defendant, alleged that mauza Ranipur was the separate property of Chait Singh, and that in virtue of the gift of the mauza to Rup Kuar by her husband Chait Singh, she had full power over it and was competent to alienate it; that the plaintiff could not rely on the Sudder Court's judgment, as the defendant was no party to the suit in which it was passed, and that the gift had been made to him for his faithful services, and was not improper.

Rup Kuar, in her written statement, in addition to the grounds of defence taken by Chandi Prasad, pleaded that, as the property of the plaintiff's father and of Partab Singh, his uncle, had been confiscated by Government, no rights passed to the plaintiff on the death of his father or his uncle, and that the judgment of the Sudder Court was not binding on her.

The first, second and fourth issues fixed for trial by the Subordinate Judge were as follows:—

(1)—"Whether the village in question is the ancestral property of Rup Kuar's husband, and the gift is invalid, or it was acquired by her husband, by virtue of gift made in his favour by Jain Kuar, and he has been in exclusive possession thereof, and has transferred it by gift to his wife, Rup Kuar, and the gift in question is, at all events, valid?"

(2)—"Whether the decree relied on by the plaintiff can be used by him as evidence or not? Has the plaintiff any right of action or not?"

(3)—"Every right of the plaintiff's father, whether in his name or not having been confiscated on account of his rebellion, can the plaintiff bring the present suit or not?"

The Subordinate Judge first decided the fourth issue in favour of the plaintiff on the ground that the plaintiff had brought the suit in his own right under Hindu law. He then decided the first [741] issue against the plaintiff, dismissing the suit on that issue. His decision on that issue was as follows:—

"The plaintiff has brought this action recognising the gift made in her favour by her husband as valid and in force; and considering that, as the said gift merely conveyed a limited

interest (life-interest) to her, she was not entitled to make the present transfer. The most important question which is now to be determined is, 'whether, under the gift made to the lady by her husband, she acquired a limited proprietary right, giving her no title to make the present alienation, or she is the absolute proprietress entitled to make this as well as every sort of alienation.' On perusing the record, it appears to me that the husband of the woman has made the gift in her favour without any condition or restriction. There is no condition whatever either for or against an alienation. As far as I can see, I consider a gift or alienation of this kind to be permanent and without any restriction. I do not think myself justified in considering a gift and alienation of this kind to be made only for the life-time of the Musammat. If the property be supposed to have actually been acquired and to have been exclusively possessed by the husband, and to have been transferred to the wife only for her life, then the gift and the expenses relating to it can be looked upon in no other light than that of a farce. If we were to limit without any good reason any such absolute transfer, these restrictions could be placed in every instance. It would then follow that, if the husband

Chatter Lal Singh v. Shewakram, 5 B. L. R. 128; S. C., 13 W. R., 285. gift or sale, the alienation would be invalid. But this is clearly wrong. The precedent noted in the margin supports the view taken by me, *viz.*, that such alienation will be considered perpetual, and a daughter-in-law and widow are entitled to alienate (property). I therefore do not consider the plaintiff entitled to bring the present claim."

THE plaintiff appealed to the High Court, contending that the decision of the Sudder Court, dated the 30th August 1875, had finally determined that Rup Kuar was not competent to alienate the mauzas which Chait Singh had transferred to her by gift, and the Subordinate Judge should not have re-opened the question; that Rup Kuar acquired mauza Ranipur by inheritance and not by gift; and that even if she acquired it by gift, she was not competent to alienate it, and the appellant was entitled to a decree setting the gift aside.

The Senior Government Pleader, *Lala Juala Prasad*, Munshi *Hanuman Prasad*, and *Lala Lalta Prasad* for the Appellant.

[742] Mr. Conlan, the Junior Government Pleader, Babu *Dwarka Nath Banarji*, Maulvi *Mehdi Hasan*, Pandit *Bishambhar Nath*, and Babu *Jogindro Nath Chaudhri* for the Respondents.

The Court (PEARSON, J., and OLDFIELD, J.) delivered the following

Judgment:--The plaintiff has brought this suit on the allegation that the estate belonged to Chait Singh as a separate estate, and his widow, the female defendant, succeeded to it at his death, and took a life-interest, and plaintiff, as the next heir to her husband at her death, sues to cancel a deed of gift made by her in favour of defendant No. 2, on the ground that there was no necessity for the alienation, and further that it was ruled, in a suit brought by plaintiff's father against the widow, on the 30th August 1865, by the Sudder Dewani Adalat, that the lady had only a life-interest, and plaintiff was heir at her death and the above decision is binding.

The defendants pleaded that the above decision does not bind the parties to this suit; that Chait Singh made a gift of the property to the defendant his wife in his lifetime, by which she obtained it absolutely, and her transfer cannot be questioned; that the plaintiff is barred by limitation; and further that, in consequence of the confiscation of his father's property for rebellion, he has no *locus standi*, and the gift was a fitting reward to defendant No. 2 for services rendered as manager of the lady's property, and had been allowed by the brother of the plaintiff.

The lower Court has decided that there was a gift by Chait Singh in favour of his wife as defendants plead, and that it gave her absolute power over the estate, and on this ground he dismissed the suit.

It appears that on the 30th August 1865, there was a review by the Sudder Dewani Adalat of a former judgment in a suit brought by plaintiff's father and uncle against the defendant No. 1, the object of which was to be declared heirs of Chait Singh in respect of his property, among which is that now in suit, and to avoid certain alienations made by the widow. It appears to have been pleaded by the defendant that the estate was held separately by Chait Singh, and that some of the property had been sold, and some, including the mauza in suit, had been given to the lady by [743] Chait Singh, and some inherited, and the Court held that the estate was the separate estate of Chait Singh, and that the mauzas sold did not form part of his estate at his death, but were the absolute property of the wife, but that the plaintiffs were entitled to be regarded as the reversioners after her death of the mauzas received by gift or inherited by her from the deceased, and competent as such to impeach any transfer thereof to other parties. The Court did not consider it necessary to decide the validity of the deed of gift on the part of Chait Singh to his wife, as they held it was immaterial to the plaintiffs whether it be valid or not, seeing that the mauzas conveyed by it would devolve on the widow by the Hindu law of succession by reason of their having belonged exclusively to her husband.

With reference to the pleas in appeal, we observe that it may be that the above decision has not the effect of *res judicata*, as the plaintiff contends, since the plaintiff does not come in through or under his father when he is suing as next heir to his uncle. Nor can there be any doubt that the defendant's husband, Chait Singh, did convey the property in suit to the defendant in his lifetime by deed of gift, for the evidence adduced on this point by the defendant is convincing. So much therefore of the case of the plaintiff which rests the claim on the allegation that the defendant succeeded as heir to her husband fails, but notwithstanding, we consider that the plaintiff is entitled to succeed in this case on the view we take of the case.

Admitting that the defendant obtained the estate by gift, there can be little doubt that by Hindu law she will have no absolute power over immoveables given by her husband. "What has been given by an affectionate husband to his wife, she may consume as she pleases, when he is dead, or give it away, excepting immoveables. The meaning is that, as regards immoveable property given by the husband, the wife is allowed to use it only by dwelling in it, but not to alienate it by gift, or sale, or in any other manner," Narada, Digest of Hindu Law by West and Bühler, Bk. ii, p. 74, and Mr. Colebrooke's remarks found in Strange, vol. ii, pp. 402, 407, which are as follows:—"No doubt the widow may give away her own property, excepting land given to her by her husband or [744] inherited from him, which she cannot dispose of without consent of the next heirs." There are other texts of the same purport, and this view of the effect of the gift was taken by the Sudder Dewani Adalat in the decision already referred to, in which the learned Judges cited a case in Macnaughten's Precedents (see case xxxi, 3d. ed., p. 230), and their ruling in that case has been followed by this Court in *Gunput Singh v. Gunga Pershad* (H. C. R., N.-W. P., 1867, p. 233). A ruling to the opposite effect by the Calcutta Court (see *Chattar Lal Singh v. Shewukram*, 5 B. L. R., 123; S.C., 18 W. R. 285) has been cited to us, but it is not in accordance with the rulings of this Court.

Immoveable property given to a wife by a husband would appear therefore to be held on terms similar to those on which property inherited from her husband is held, and her acts in respect of it liable to question in a similar manner by the next heirs. And there seems no doubt plaintiff is in a position to question the alienation made by the widow as next heir, whether the property be held to be the lady's *stridhan* governed by the law of succession applicable to *stridhan*, or it be held subject to the ordinary succession of property inherited from her husband. In the latter case he is next heir to the husband, and if it be subject to the succession as *stridhan*, the lady being a childless widow, he will succeed failing the husband.

The defendants' pleas of limitation fail, since the right of suit to cancel the gift cannot be said to have accrued to plaintiff before the date of the alienation, and there has been no possession on the part of the widow which can be said to be adverse to the title. Nor is there anything in the confiscation of the father's property which can affect the plaintiff's reversionary rights as heir to his uncle. There remains the question of the validity of the alienation to defendant No. 2. The ground stated for the gift is that it was a reward for good and faithful services as the lady's manager. We do not think it is shown that the defendant has not always received his regular remuneration for services performed; on the contrary, it would appear that he has; and the gift in question can only be considered to be an act of generosity, and not one strictly called for by the circumstances, and which should be met from the lady's private [748] resources if at all, but is not one which can justify a permanent alienation of part of the landed estate which belonged to her husband.

The plaintiff will have a decree declaring that the gift to the defendant is invalid so far as it affects plaintiff's reversionary right as next heir. The appeal is decreed with costs.

Appeal allowed.

NOTES.

[HINDU LAW—HUSBAND'S GIFT OF IMMOVEABLE PROPERTY.—

Sir Gurudas Banerjee in his *Marriage and Stridhana*, 3rd Edition (1913), p. 338, is of opinion that the restrictions on the Hindu widow in respect of gifts of immoveable property from the husband, enure in favour of the *stridhana* heirs as distinguished from the husband's reversionary heirs. See also p. 337 of the same book.]

[1 All. 746]
FULL BENCH.

The 16th July, 1878.

PRESENT :

MR. JUSTICE TURNER, OFFICIATING CHIEF JUSTICE, MR. JUSTICE PEARSON,
AND MR. JUSTICE OLDFIELD.

Collis.....Plaintiff
versus
Manohar Das.....Defendant.*

Application for leave to sue as a pauper—Appeal—Act X of 1887 (Civil Procedure Code), ss. 2, 54, 407, 314, 450, 588—Act VIII of 1859 (Civil Procedure Code), s. 311.

No appeal lies under Act X of 1877 from an order made under that Act rejecting an application for permission to sue as a pauper.

ONE Edwin Collis applied to the Judge of the Small Cause Court at Allahabad, exercising the powers of a Subordinate Judge, for permission to bring a suit as a pauper. The Judge, under s. 407[†] of Act X of 1877, rejected the application on the ground that the petitioner was possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit.

The petitioner preferred an appeal to the High Court against the Judge's order rejecting his application.

The Court (TURNER, Offg. C.J.), on the 12th June 1878 ordered the petition of appeal to be laid before a Division Bench of the Court. The Division Bench (TURNER, Offg.C.J., and PEARSON, J.), on the 14th June 1878, admitted the appeal in order that the question whether an appeal would lie or not might be argued. This question was argued before the Division Bench, which directed that the case should be laid before the Full Bench.

The petitioner appeared in person and contended that the order of the Small Cause Court Judge was a "decree" within the meaning [746] of s. 2 of Act X of 1877, and that it was consequently appealable under s. 540 of that Act. He referred to *Thakur Prasad v. Ahsan Ali (ante)*, p. 668.

The Junior Government Pleader (Babu Dwarka Nath Banarji) for the opposite party, contended that the order was not appealable under Act X of 1877.

* Miscellaneous Application, No. 15B., against an order of G. E. Knox, Esq., Judge of the Small Cause Court, Allahabad, dated the 30th April 1878.

Rejection of application. † [Sec. 407 :—If it appear to the Court upon such examination
(a) that the applicant is not a pauper, or
(b) that he has, within the two months next before the presentation of the application, disposed of any property fraudulently or with a view to obtain the benefit of this chapter, or
(c) that his allegations do not show a right to sue in such Court, or
(d) that he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter, the Court shall reject the application.]

The following Judgments were delivered by the Full Bench :—

Pearson, J.—This is an appeal from an order passed under s. 407 of Act X of 1877, rejecting an application for permission to sue as a pauper. Such an order was not subject to appeal under the old Code of Procedure (s. 311 of Act VIII of 1859). The question is whether it is appealable under the new Code of Procedure, Act X of 1877. No provision for an appeal from such an order is made in s. 588 of the Act. The appellant contends that it is appealable as a decree under s. 540, in reference to the terms of the second section, in which a decree is defined as the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied.

The order in question certainly does not embody the result of the decision of the suit, which it refuses to entertain in the manner in which it is sought to be instituted without payment of the fee payable by law on the plaint.

It can hardly be denied that the order embodies the result of a judicial proceeding. But so also do the orders specified in s. 588 embody the result of a judicial proceeding, yet it cannot be presumed that those orders were regarded as decrees appealable under s. 540* by the Legislature, for had they been so regarded, it would have been unnecessary to declare in s. 588 that an appeal shall lie from them. It seems to follow that the judicial proceedings referred to in s. 2 are proceedings of a different nature from those which result in the orders specified in s. 588, and that they in some degree resemble and partake of the character of a suit.

The category given in s. 588 includes all important orders passed in the course of the trial of a suit and the execution of a [747] decree, except the most important of all, namely, orders finally disposing of applications for the execution of decree. As it is impossible to suppose that an appeal would be allowed from orders of secondary importance, and not from orders of the first importance, it may reasonably be concluded that orders finally disposing of applications for the execution of decrees were intended to be appealable as decrees under s. 540. A recent judgment of the Full Bench of this Court (*Thakur Prasad v. Ahsan Ali, ante*, p. 668) has settled that they are so appealable.

Proceedings in execution of decree necessarily follow what is called the decision of the suit in s. 2. They may, indeed, be still a part of the suit, if that be held not to terminate with the decree, but with the execution of the decree. Nevertheless each application for execution may be viewed as a little suit of itself, though it be a suit within a suit; and the proceedings in each are not unlike those in the trial of the suit. That proceedings under s. 244 were so viewed by the Legislature is indicated by the provision made in s. 588, cl. (j) for appeals from orders passed in the course of them of the same nature with appealable orders made in the course of a suit.

An application for permission to sue as a pauper is really the presentation of a plaint. The order passed upon it does not so much resemble an order determining matters in issue between parties relating to the execution of a

*[Sec. 540 :—Unless when otherwise expressly provided in this Code or by any other law

Appeal to lie from all original decrees, except when expressly prohibited, for the time being in force, an appeal shall lie from the decrees, or from any part of the decrees, of the Courts exercising original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts.]

decree as an order passed under s. 54, cl. (b),¹ rejecting a plaint written on paper insufficiently stamped. That order is not a decree appealable under s. 540, but is appealable under s. 588, cl. (e). From an order rejecting an application under s. 407[†] it was presumably deemed unnecessary to allow an appeal in reference to the provisions of s. 413. The present appeal should therefore in my opinion be rejected.

Turner, Offg. C. J.—I concur in the judgment pronounced by Mr. Justice PEARSON.

Oldfield, J.—I concur in the judgment of Mr. Justice PEARSON.

Appeal rejected.

NOTES.

[See (1898) 21 All. 133; contra (1886) 9 All. 129.]

[748] FULL BENCH.

The 16th July, 1878.

PRESENT :

MR. JUSTICE TURNER, OFFICIATING CHIEF JUSTICE, MR. JUSTICE PEARSON
AND MR. JUSTICE OLDFIELD.

Gulab Singh.....Petitioner

versus

Lachman Das.....Opposite Party.²

Application to set aside an ex parte decree—Appeal—Act X of 1877 (Civil Procedure Code), ss. 2, 103, 108, 244, 540, 588—Act VIII of 1859 (Civil Procedure Code), s. 119.

No appeal lies under act X of 1877 from an order made under that Act rejecting an application for an order setting aside a decree made *ex parte* against a defendant.

A DECREE was passed *ex parte* against one Gulab Singh, the defendant in a suit. He applied to the Court of First Instance for an order to set this decree aside, on the ground that no summons to appear had been served upon him. The Court, on the 20th December 1877, rejected the application.

Gulab Singh preferred a petition of appeal to the High Court against the order rejecting the application. The Court (PEARSON, J.) referred the case to

* Miscellaneous First Appeal, No. 35 of 1878, from an order of Maulvi Sayyid Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 20th December 1877.

† [Sec. 54 :—The plaint shall be rejected in the following cases :—

* * * * *

(b) If the relief sought is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so ;

the Full Bench, observing that, unless orders made under s. 108^{*} of Act X of 1877 fell within the definition of decrees and were appealable as such, there seemed to be no provision in Act X of 1877 for appeals from orders made under that section.

Babu Dwarka Nath Mukarji for the Petitioner.

The opposite party was not represented.

The following **Judgments** were delivered by the Full Bench :—

Pearson, J.—Section 119 of Act VIII of 1859 provided that “no appeal shall lie from a judgment passed *ex parte* against a defendant who has not appeared,” but that, “in all cases in which judgment may be passed *ex parte* against a defendant, he may apply within a reasonable time to the Court by which the judgment was passed,” for an order to set it aside, and that “in all cases in which the Court shall pass an order for setting aside the judgment, the order shall be final, but in all appealable cases in which the Court shall reject the application, an appeal shall lie from the order of rejection to the tribunal to which the final decision in the suit would be appealable.”

Under the new Code of Procedure an *ex parte* decree is appealable like any other decree. The provision that no appeal shall lie [749] against an *ex parte* decree has not been re-enacted. Section 108 of Act X of 1877 provides that, as before, “in any case in which a decree is passed *ex parte* against a defendant under s. 100, he may apply to the Court by which the decree was made for an order to set it aside.” Section 119 of Act VIII of 1859 made provisions of a somewhat similar nature in respect of judgments against a plaintiff by default. He was not allowed to appeal against the judgment, but was permitted to apply within thirty days from its date for an order to set it aside; and in all appealable cases in which the application was rejected, the order of rejection was appealable. By the new Code of Procedure it may be a question whether a plaintiff is not precluded from appealing from a judgment against him by default; but he may, under s. 103 of Act X of 1877, apply for an order to set the dismissal of his suit aside; and under cl. (f), s. 588, orders rejecting applications under s. 103 (in cases open to appeal) for an order to set aside the dismissal of a suit are expressly declared to be appealable. As there is no provision of a like nature made in s. 588 of Act X of 1877 for appeals from orders rejecting applications under s. 108 for setting aside *ex parte* decrees, it is *prima facie* inferrible that such orders were not intended by the Legislature to be appealable. There remains the question whether such orders can be held to be decrees within the scope of the definition of a decree given in s. 2 of the Act, and as such appealable under s. 540. It is obvious to remark that if such orders could be regarded as decrees, so also might orders on applications under s. 103 refusing to set aside *ex parte* decrees be regarded as decrees. The circumstance that provision has been made in s. 588 for an appeal from orders rejecting applications under s. 103 seems to show that they were not regarded as decrees appealable under s. 540 by the Legislature, and warrants the conclusion that orders rejecting applications under s. 108 cannot properly be so regarded. “Decree” is defined in s. 2 as meaning the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied. An order refusing an application to set aside an *ex parte* decree

* [Sec. 108 :—In any case in which a decree is passed *ex parte* against a defendant under Setting aside decree *ex parte* Section 100, he may apply to the Court by which the decree was *parte* against defendant. made for an order to set it aside ;

and if it be proved to the satisfaction of the Court that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the decree upon such terms as to costs, payment into Court, or otherwise, as it thinks fit, and shall appoint a day for proceeding with the suit.]

certainly does not embody the result of the decision of the suit. Such an order does, indeed, it must be admitted, embody the result of a judicial proceeding. But so do the orders specified in s. 588 embody the results of judicial proceedings, and yet they cannot be presumed to have been [750] regarded by the Legislature as decrees appealable under s. 540 ; for had they been so regarded, it would have been unnecessary to declare in s. 588 that an appeal shall lie from them. It is presumable then that the judicial proceedings referred to in s. 2 are of a different nature from those which result in the orders specified in s. 588, and that they in some decree resemble and partake of the character of a suit. The category given in s. 588 includes all important orders passed in the course of the trial of a suit and the execution of a decree, except the most important of all, namely, orders finally disposing of applications for the execution of decrees. As it cannot be supposed that an appeal would be allowed from orders of secondary importance, and not from orders of the first importance, it may reasonably be concluded that orders finally disposing of applications for the execution of decrees were intended to be appealable as decrees under s. 540. A recent judgment of the Full Bench of this Court (*Thakur Prasad v. Ahsan Ali*, ante, p. 668) has settled that they are so appealable. Proceedings in execution of decree, following the decision of the suit, may be still a part of the suit, if that be held to terminate not with the decree, but with the execution of the decree. Nevertheless each application for execution may be viewed as a little suit of itself, though it be a suit within a suit ; and the proceedings in each are not unlike those in the trial of a suit. That proceedings under s. 244 were so viewed by the Legislature as proceedings of a distinct kind, analogous to proceedings in a suit, is indicated by the special and remarkable provision made in s. 588, cl. (j) for appeals from orders passed in the course of proceedings under s. 244 of the same nature as orders appealable in the course of a suit. The proceeding which results in an order rejecting an application to set aside an *ex parte* decree is a proceeding very different from that which results in an order determining matters in issue between parties relating to the execution of a decree, and is not at all of the same character as a suit. The present appeal should, therefore, in my opinion, be rejected.

Turner, Offg. C.J.—I am of the same opinion.

Oldfield, J.—I concur in the view expressed by Mr. Justice PEARSON.

Appeal rejected.

NOTES.

[This is no longer law ; see the Civil Procedure Code, 1908, especially Or. 43, cl. (d). The case of 4 All. 387 also is not law.]

[781] APPELLATE CIVIL.

The 18th July, 1878.

PRESENT:

MR. JUSTICE TURNER, OFFICIATING CHIEF JUSTICE, AND
MR. JUSTICE PEARSON.

Fateh Singh.....Plaintiff

versus

Sanwal Singh.....Defendant.*

Act IX of 1872 (Contract Act), ss. 23, 24—Unlawful Consideration—Void agreement—Act X of 1872 (Criminal Procedure Code).

F was required by the Magistrate, under the Code of Criminal Procedure, to furnish two sureties, who should be responsible for his good behaviour, each in a certain sum. *S* agreed to become a surety on condition that *F* would deposit with him the amount of the security. *F* made the deposit, and *S* became a surety. The period for which *S* was responsible for *F*'s good conduct having expired without *F* committing any act to forfeit the security, and *S* refusing to return the deposit, *F* sued *S* to recover the deposit. Held that, as the consideration for the agreement defeated the object of the law, the consideration was unlawful, and *F* was not entitled to relief.

IN August 1875, one Fateh Singh was required, under s. 505 of Act X of 1872, to procure two persons of approved respectability who would be responsible for his good behaviour for one year each in the sum of Rs. 600. He produced one Sanwal Singh and a certain other person. These persons were accepted by the Magistrate as his sureties, and Fateh Singh was released from custody. The period of time for which these sureties were to be responsible for Fateh Singh's good conduct elapsed without his committing any act to forfeit the security. The present suit was brought by Fateh Singh against Sanwal Singh to recover from him Rs. 600. This sum the plaintiff alleged he had deposited in August 1875 with the defendant in consideration of the defendant's giving security for his good behaviour. The defendant denied that the plaintiff had made the alleged deposit with him. The Munsif trying the suit fixed as the sole issue, "Was the amount claimed by the plaintiff deposited by him with the defendant in consideration of the defendant's giving security for the plaintiff's good behaviour?" This issue the Munsif determined in the defendant's favour, and dismissed the plaintiff's suit. On appeal by the plaintiff, the District Judge found that the money had been deposited by the plaintiff with the defendant as alleged. The Judge nevertheless dismissed the plaintiff's suit for the following reasons:—"The only doubtful point in my mind is as to the suit being of a nature capable of obtaining [782] relief. Under the rules of the Criminal Procedure Code a person called upon to furnish bail for good behaviour cannot pay cash in lieu of security; the object in having other persons to stand bail for him is to protect society against the perpetration of crime, and it is the duty of the sureties to look after their charge, and a

* Second Appeal, No. 1891 of 1877, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 27th August 1877, affirming a decree of Munshi Lalita Prasad, Munsif of Cawnpore, dated the 22nd March 1877.

Magistrate is competent to refuse a surety offered if he thinks such surety is an unfit person (s. 516^{*} of Act X of 1872). When the surety knows that his bail-bond would be forfeited and he himself mulcted to the extent of the liability set forth therein on any failure of his to discharge that duty, he would naturally fulfil his duty, and the law would be satisfied; but if, on the other hand, he receives a sum of money from the individual for whom he stands surety equal to the value of the bail, he has not the same interest in watching the doings of his charge; he may be quite indifferent to the regards of society, and allow his charge to do and act as he pleases, conscious that, if his bail-bond be forfeited, he would only be called upon to make good its value; he will in short have served his friend a good turn, but will thus have defeated the requirements of law, and any act which is in itself opposed to the principles of law is incapable of relief: it follows then that an abetment of such an act also places itself beyond civil remedy. Looking upon the act of plaintiff in advancing a money inducement to defendant to stand bail for him as illegal, although the custom is orally said to maintain and to be not infrequent, I arrive at the same conclusion as the lower Court, although upon different grounds, and sustain the finding."

The plaintiff appealed to the High Court, contending that he was entitled to recover the money claimed by him.

Pandit Ajudhia Nath and Mir Akbar Hussain for the Appellant.

Mr. Chatterji, the Junior Government Pleader (Babu Dwarka Nath Banarji), and Pandit Bishambhar Nath for the Respondent.

The Judgment of the Court was delivered by

Turner, Offg. C.J.-- The appellant was required by the Magistrate to furnish two sureties for his good behaviour, each in the sum of Rs. 600. The respondent agreed to become a surety on condition that the appellant would deposit with him the sum in which he was required to go bail. The deposit was made, the period of suretyship expired without any act having been committed by the appellant to forfeit the security, and therefore the appellant applied to the respondent to repay the deposit. The respondent refused, denying the deposit. The appellant brought this suit to recover the deposit, but failed to establish to the satisfaction of the Court of First Instance that the deposit had been made. The lower Appellate Court found that the deposit of the sum of Rs. 600 with the respondent on the terms alleged was proved, but refused relief on the ground that the consideration of this agreement was unlawful in that it defeated the object of the law.

In special appeal the appellant challenges the propriety of this ruling.

In our judgment the conclusion at which the Judge has arrived is right. The Criminal Procedure Code, ch. xxxviii, empowers the Magistrate to require a person of notoriously bad livelihood to procure sureties who shall be responsible for his good conduct in the amounts required from them. If the amount for which a surety is responsible is deposited with him by, or on behalf of, the person for whose conduct he undertakes responsibility, it is obvious that he is responsible only in name. No Magistrate with a knowledge of the facts would be justified in accepting the surety under this chapter. The object of the law

Sureties may be rejected ^{*[Sec. 516:—A Magistrate may refuse to accept any surety offered under this Chapter on the ground that such surety is an unfit person.]}

would be defeated. We must then affirm the decision of the Judge and dismiss the appeal, but seeing that the respondent denied the deposit, and that he was a party to the agreement, and that the point raised is novel, we order each party to bear his own costs in all Courts.

Appeal dismissed.

NOTES.

[In (1899) P. R. 1 it was held that the surety who gave bail to an accused cannot recover it from him on its forfeiture.]

[1 All. 783.]

APPELLATE CIVIL.

The 8th June, 1874.

PRESENT :

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR. JUSTICE OLDFIELD.

Vaughan.....Plaintiff

versus

Heseltine and others.....Defendants.*

Will—Devise of immoveable property subject to its being charged in a particular manner by the devisee—Property not charged in accordance with the Will—

Suit to enforce charge—Assignment by a Legatee to Executor of Legacy.

Certain immoveable property was devised by will upon condition that the devisee, who was also an executor of such will, should execute a mortgage of [784] such property to the Official Trustee of Bengal for the time being to secure the payment of a certain legacy. The devisee, with the intention of giving effect to such condition, mortgaged such property to his co-executors. Held, in a suit by one of such co-executors to enforce the mortgage, that the mortgage, not being executed in accordance with the terms of the will, was invalid, and the suit was not maintainable.

Sembler that an assignment by a legatee to an executor of a legacy is void.

ONE Joseph Nelson Heseltine by the 9th clause of his will, dated the 16th February 1864, devised his estate known as the Ellenborough Hotel estate to the use of his son, Robert Henry, upon condition that he should, when so requested by the trustees of the will, execute and deliver to them a mortgage of such estate for securing to the trustees the payment of the sum of Rs. 16,000 bequeathed in the will to the trustees upon certain trusts therein mentioned. The testator further directed that such payment was to be made by annual instalments of Rs. 3,000 each without interest, and that the first of these instalments was to be paid at the expiration of one year after his death. The testator by his will appointed his son, Robert Henry, and his son-in-law, Joseph Hurst, the executors of his will, and Charles Frederick Vaughan and the Administrator-General of Bengal for the time being trustees of it. By a codicil to his will, dated the 24th February 1865, the testator revoked the

* Regular Appeal, No. 77 of 1873, from a decree of W. E. Kinsey, Esq., Subordinate Judge of Dehra Dun, dated the 18th May 1873. Reported under a special order of the Hon'ble the Chief Justice.

appointment of Sir Charles Frederick Vaughan, and the Administrator-General of Bengal as trustees, and appointed the Official Trustee of Bengal for the time being the sole trustee of his will. He thereby further appointed Charles Frederick Vaughan to be an executor of his will in addition to his son, Robert Henry, and his son-in-law, Joseph Hurst. He also thereby gave and bequeathed to his daughter Charlotte, wife of Joseph Hurst, the sum of Rs. 12,000 "for her own sole use and benefit, free from the control, debts, and liabilities of her then or any future husband," and he directed that such sum of Rs. 12,000 should be paid to Charlotte Hurst "on her sole and personal receipt" out of the sum of Rs. 16,000 charged upon the Ellenborough Hotel estate. He further directed that such payment to his daughter Charlotte was to begin from the receipt by the trustees of his will of the second instalment of Rs. 3,000.

On the 2nd March 1866, Robert Henry Heseltine executed a mortgage of the Ellenborough Hotel estate to Joseph Hurst and [755] Charles Frederick Vaughan to secure the payment of the sum of Rs. 16,000, with the intention of giving effect to the condition imposed upon him by the 9th clause of his father's will.

On the 20th July 1870, Charlotte Hurst assigned by sale to Charles Frederick Vaughan the sum of Rs. 12,000 bequeathed to her under the codicil to her father's will. The consideration for the sale was stated in the sale-deed to be Rs. 8,000. This deed contained a power of attorney authorising Charles Frederick Vaughan, for Charlotte Hurst and in her name, but for his own use and benefit, to demand, sue for, and receive the legacy from the proper persons, and on payment of the money to give a receipt for the same.

On the 11th February 1873, Charles Frederick Vaughan brought the present suit against Robert Henry Heseltine to enforce the mortgage of the 2nd March 1866. The plaintiff claimed to recover Rs. 19,427-8-0, being the amount of the second, third, fourth, fifth and sixth annual instalments of Rs. 3,000 each, and interest, by the sale of the Ellenborough Hotel estate, making Joseph Hurst a defendant in the suit, as he refused to join in it as a plaintiff. The suit was instituted in the Court of the Subordinate Judge of Dehra Dun. The Mussoorie Bank, which held a prior mortgage of the Ellenborough Hotel estate, was made a defendant in the suit on its own application. The plaintiff did not describe himself in the plaint in the suit as an executor, and did not produce the will of J. N. Heseltine, but only the deed of the mortgage. The plaint was therefore returned to him by the Subordinate Judge for amendment, and the case was adjourned for the production of the will. At the second hearing of the suit Joseph Hurst consented to be made a co-plaintiff. The issues for trial were fixed at this hearing, the first of them being as follows : "Can Vaughan, as 'executor, purchase of a legatee ?'" At this hearing the defendant admitted his liability to the extent of the instalments sued for. At the final hearing of the suit Joseph Hurst did not appear. The Subordinate Judge dismissed the suit on the first issue, on the 18th May 1873, on the ground that the plaintiff was not suing as an executor for the benefit of the estate, but to enforce the assignment to him by Charlotte Hurst of her legacy, which assignment the Judge considered invalid.

[756] The plaintiff appealed to the High Court against the decree of the Subordinate Judge.

Mr. Warner, for the Appellant, contended that the Subordinate Judge was wrong in dismissing the suit upon a point foreign to it; that the assignment by Charlotte Hurst to the plaintiff of her legacy was not void, but merely voidable at the option of the assignor; that Charlotte Hurst was no party to

the suit, nor had she taken any steps to have the assignment set aside ; that the assignment could only be set aside upon repayment of the consideration-money, together with interest, and the costs incurred in connection with the assignment ; that the suit was not based on the assignment but on the mortgage, and the mortgage was valid, and should have effect given to it ; that as the defendant had admitted the claim to the extent of the instalments due, a decree should have been made against him ; and that the Mussoorie Bank had erroneously been made a party to the suit.

Mr. Howard (with him Messrs. Hill, Newton and Quarry) contended that the mortgage was invalid, as it had not been made in accordance with the wishes of the testator as expressed in his will, *viz.*, to the Official Trustee of Bengal, for the time being, but to two of the executors of the will, and that the suit was consequently not maintainable.

The following **Judgments** were delivered by the Court :—

Stuart, C.J.—This is a regular appeal from the Court of the Subordinate Judge of Dehra Dun in a suit by the plaintiff, Vaughan, against the defendants, Heseltine and Hurst, to recover Rs. 19,427-8-0 principal and interest alleged to be due on a mortgage on certain property called the Ellenborough Hotel estate, under the following circumstances : The plaintiff, Mr. Charles Frederick Vaughan, sued as one of the executors of the late Mr. J. N. Heseltine, who died on the 8th March 1865, leaving a will, dated the 16th February 1864, and a codicil thereto bearing dated the 24th February 1865. By the will the testator disposed of his estate and effects, and various legacies were left to different parties, and among others two sums, both of Rs. 6,000—Rs. 12,000 in all—on certain conditions and contingencies, to the testator's grand-children, Joseph Hurst and Isabella Hurst, but in the event of their deaths, as therein explained, he directed the said two sums [787] of Rs. 6,000 to be paid "unto my daughter, Mrs. Charlotte Hurst, the mother of Joseph Hurst and Isabella Hurst, for her absolute use and benefit, and her receipt for the same, whether covert or sole, shall be a sufficient discharge for the same." The will appointed the testator's son, Robert Henry, and his son-in-law, Joseph Hurst, one of the defendants, to be the executors thereof, and by a separate nomination he appointed the plaintiff "and the Administrator-General of Bengal for the time being" to be trustees of the will for the carrying out the trust thereby declared, and by the 20th clause of the will the testator made the usual provision for the continuance of the trust in the event of death or failure. By clause 9 of the will the testator specially devised the Ellenborough Hotel estate to the use of "my said son Robert Henry, his heirs and assigns, upon condition that he or they do, upon being so requested by my trustees, execute and deliver to them a good and sufficient mortgage of the said Ellenborough Hotel estate for securing payment of the sum of Rs. 16,000, etc." Such were the provisions of the will on these points ; but the codicil, which is of considerable length, altered and revoked the will in various particulars, and among other things it altered the will as to the trustees as follows : "And whereas by the 19th clause of my said will I have nominated and appointed the said Charles Frederick Vaughan, in the said will styled Mr. Charles Vaughan, and the Administrator-General of Bengal for the time being, to be trustees of my said will, now I do hereby revoke such said appointment, and I do nominate and appoint the Official Trustee of Bengal for the time being to be sole trustee of my said will for the purpose of carrying out the trusts therein and herein declared, and I declare that my said will shall accordingly be so read and construed as if the said Official

Trustee of Bengal for the time being had in my said will been named and mentioned instead of the said Mr. Charles Vaughan and the said Administrator-General of Bengal for the time being." There was therefore to be but one trustee and that "the Official Trustee of Bengal" in place of Mr. Vaughan and the Administrator-General of Bengal, as provided by the will. The codicil then goes on to revoke the said 20th clause of the will, and also the clauses providing for the legacies to the grand-children, "and in lieu and instead thereof" the codicil provided as follows:—"I do hereby give and bequeath to my daughter [788] Charlotte, wife of my said son-in-law, Joseph Hurst, and mother of my said grand-children, Joseph and Isabella Hurst, the sum of Rs. 12,000 absolutely, for her own sole use and benefit, free from the control, debts and liabilities of her present or of any future husband with whom she may hereafter intermarry; and I direct such said sum of Rs. 12,000 to be paid to my said daughter Charlotte on her sole and personal receipt from and out of the sum of Rs. 16,000 charged upon my Ellenborough Hotel estate, situate at Rajpur aforesaid, under the terms and conditions of the 9th clause of my said will, such said payment to my said daughter Charlotte to begin and commence from the receipt by the trustee of this my will of the second instalment of Rs. 3,000 provided for in the said 9th clause of my said will, and to continue until the said sum of Rs. 12,000 shall be fully paid and satisfied from and out of the said fund, and any balance that may remain due after payment of the last of such said instalments shall be paid and satisfied out of the general assets of my estate."

We may presume that the testator had good and sufficient reasons for this change in his testamentary arrangements, and the circumstances which gave rise to this suit may well suggest what these reasons were. They are at least intelligible. But it will be observed that, while the codicil revoked the appointment of trustees as made by the will, it contained no express revocation of the testator's direction to his son to execute and deliver the mortgage itself for Rs. 16,000, and in fact, on the 2nd March 1866, which was within a year from his father's death, the son did, with the apparent approval of all concerned, including the plaintiff himself execute a mortgage-deed of the Ellenborough Hotel estate in favour of Joseph Hurst and Mr. Vaughan and who, it will be recollect, were the trustees originally appointed. It is not disputed that the testator's estate was ample for all his testamentary purposes, and that there would be little or no difficulty in raising the Rs. 16,000 on the security of the Ellenborough Hotel estate. But some delay occurred, and it would appear that at the end of 1869 or beginning of 1870, Mr. Vaughan, the plaintiff, commenced negotiations with Mrs. Hurst for the purchase of her legacy, the result of which was that he, being an executor of the will, purchased for the price of Rs. 8,000 [789] a legacy of Rs. 12,000. Vaughan himself states that he does not recollect by whom the proposal for the purchase was made, but in the opinion of the Subordinate Judge it came from himself. This was the crisis of the suit in the Court below, and the Subordinate Judge's decision was that such a transaction could not stand, and he dismissed the suit with costs. Without pronouncing any judicial opinion on the question, which, from what I am about to explain, we are not called upon to do, I may be permitted to say that such negotiations between the executor of a will and a legatee are very questionable and improper, and if this case had been argued before us on the basis of the lower Court's judgment, it is I think probable that we would not have found much fault with it. But at the hearing of the appeal before us, the counsel for the respondent disregarding the appellant's arguments on the merits of the Subordinate Judge's decision, took the objection that the mortgage-deed, which is the basis of the suit, is invalid, and affords no cause of action to the plaintiff, on the

ground of its not being conformable with the true construction of the will and codicil, and I am of opinion that this objection is well founded. Although in the form of a suit to recover on a mortgage of a portion of the estate, it is really in the nature of one for the administration *pro tanto* of that estate, and it is more important to consider what were the testator's wishes and intentions. I observe that in the mortgage-deed itself the codicil is referred to by date, and is there described as "in no way revoking that portion of the 9th clause of the will hereinbefore recited," but whether this was the idea of the mortgagor himself or the opinion of his legal advisers or draughtsmen, it is in my judgment altogether erroneous. The direction to the son contained in the will was to execute and deliver a mortgage-deed to the trustees, that is to Mr. Vaughan and the Administrator-General of Bengal. The appointment, however, of these gentlemen was expressly revoked by the codicil, and a single trustee, in the person of "the Official Trustee of Bengal," was appointed in their stead. It is impossible, therefore, to contend that the mortgage, as actually made, was an administration *pro tanto* of the testator's estate according to his true intentions. The objection is indeed an obvious and substantial one, and it is extraordinary that the codicil to the will on which it is founded should have been overlooked, not only by the Subordinate Judge himself, but by all the parties before him.

[760] Without prejudice, therefore, to any suit which may be instituted for carrying out the intentions of the testator with respect to the direction to mortgage, or generally for the proper administration of the estate, I would dismiss this appeal, and dismiss the present suit, but seeing that the objection allowed by this judgment was not taken in the Court below, without costs. The Mussoorie Bank, however, who are the holders of a mortgage by the testator himself, and who have been obliged to intervene as co-defendants and co-respondents, are entitled to their costs, and these the plaintiff, appellant, must pay.

Oldfield, J.—The plaintiff in this suit, C. F. Vaughan, is one of the executors to the will of J. N. Heseltine. The defendant, R. H. Heseltine, is the son of J. N. Heseltine, and also one of the executors. The suit is to recover, as one of the executors, Rs. 19,427-8-0 principal and interest, on a mortgage-deed of the Ellenborough Hotel estate. It appears that, under the will and codicil of the late J. N. Heseltine, the estate known as the Ellenborough Hotel estate was devised to the use of his son, R. H. Heseltine, defendant, respondent, upon condition that he should execute and deliver to the trustees under the will a mortgage of the said estate for securing to the said trustees payment of Rs. 16,000, to be paid by equal yearly instalments of Rs. 3,000 each, the first to be paid at the expiration of one year after the death of the testator, a sum of Rs. 12,000 to be paid out of the above sum to testator's daughter, Charlotte Hurst, and the rest as otherwise devised. The will and codicil further made R. H. Heseltine, defendant, J. Hurst, and C. F. Vaughan, plaintiff, executors, and the Official Trustee of Bengal for the time being the sole trustee for the purpose of carrying out the trusts named in the will. After the death of the testator the mortgage-deed on which this suit is based was executed by R. H. Heseltine in favour of the other two executors, Hurst and Vaughan, and the latter now sues to recover under it.

The claim was dismissed by the lower Court on a preliminary objection, and the appeal rests on the same ground, which has been fully discussed in the judgment of the Chief Justice. It is unnecessary for me to notice this point, as I am of opinion that the appeal must be dismissed on a ground taken before us by the respondent's counsel, that the mortgage-deed is absolutely void, and **[761]** the claim on it unsustainable. The title of the parties to the mort-

gage-deed and to execute the mortgage rests solely on the will and codicil of J. N. Heseltine, and if these be examined, it will be found that they convey no power to execute such a mortgage. The will directed by the 9th paragraph that the Ellenborough Hotel estate was devised to "R. H. Heseltine his heirs and assigns, upon the condition that he or they do, on being so requested by my trustees, execute and deliver to them a good and sufficient mortgage of the said Ellenborough Hotel estate for securing to the said trustees, their executors, and administrators, payment of the sum of Rs. 16,000 hereinbefore bequeathed to them upon trust, etc.," and by the codicil the Official Trustee was appointed sole trustee, while R. H. Heseltine, Hurst, and Vaughan were appointed executors.

There has been no conformance with the terms of the will and codicil in the execution of the mortgage-deed the basis of the claim, which is executed, not in favour of the trustees, but of two out of three executors. The intention of the parties was to carry out the condition of the will and codicil, but these gave no power to execute such a mortgage-deed, which has been made contrary to the will and codicil and under a mistake as to the facts on the part of the parties to it, that they were thereby carrying out the condition of the will and codicil. Such a deed is invalid and can convey no right to the property to the plaintiff. The claim therefore must fail.

There is one plea raised in appeal which is to be noticed, whether the Manager of the Mussoorie Bank was properly made a party to the suit, and I consider he was, inasmuch as, holding an alleged prior mortgage on the property, he had an interest in asserting its priority in this suit, which included a claim to bring to sale the property.

I would, therefore, though on different grounds, affirm the decision of the lower Court, and dismiss the appeal, but without costs as regards all the defendants except the Manager of the Mussoorie Bank, who should get his costs.

Appeal dismissed.

[762] APPELLATE CIVIL.

The 3rd May, 1877.

PRESENT:

SIR ROBERT STUART, KT., CHIEF JUSTICE, AND MR. JUSTICE SPANKIE.

Hurst.....Plaintiff

versus

The Mussoorie Bank.....Defendant.*

Real property—Legacy—Husband and wife.

C, a married woman, was entitled, under her father's will, to certain money "absolutely for her sole use and benefit, free from the control, debts, and liabilities of her husband," and under such will such money was payable to her "on her sole and personal receipt." While so entitled C borrowed from her husband the purchase-money of certain real property, on the understanding that she would pay him back such money when she obtained her legacy. The conveyance of such property was made to C, but not to her separate use. C subsequently assigned her legacy by sale, and out of the money obtained by such assignment repaid her husband the purchase-money of the property purchased. Held that the conversion by C of her legacy did not alter its character and conditions, and that the property purchased was her own separate property, and was not subject to the debts or liabilities of her husband.

IN November 1868, Joseph Hurst agreed to purchase a village called Mohkampur. At his request the property was not conveyed to him, but to his wife, Charlotte. The purchase-money was stated in the deed of sale, which was dated the 11th November 1868, to be Rs. 6,000. Joseph Hurst paid the purchase-money by a cheque on the Mussoorie Bank for Rs. 6,350 drawn against a cash credit loan he had with the Bank. When the deed of sale was registered a power of attorney executed by Mrs. Hurst was also registered, which appointed Joseph Hurst Manager of the property on her behalf. In 1876 Joseph Hurst and his wife were in pecuniary difficulties. In a suit registered as No. 155 of 1874, the Mussoorie Bank held a decree against them both. In another suit registered as No. 185 of 1874, the same Bank held a decree against Joseph Hurst and his brother-in-law, Robert Henry Heseltine, and a third suit registered as No. 56 of 1876, brought by one Khushal Rai and another person, a decree had been made against Joseph Hurst and his wife. In execution of the decree in suit No. 155 of 1874, the village of Mohkampur was attached on the 31st March 1876. On the 4th April 1876, an order was made for the sale of the property on the 20th May 1876. On the application of Joseph Hurst and his wife, [763] and on their satisfying the decree in part, and executing an agreement to pay the balance, this sale was postponed *sine die*. On the 9th June 1876, Mohkampur was again attached in the execution of the decree obtained by Khushal Rai. No further proceedings were taken in this case till the 6th October 1878. Mohkampur was again attached on the 13th July 1876, in execution of the decree obtained by the Mussoorie Bank against Joseph Hurst and Robert Henry Heseltine. On the 17th July 1876, an order was made for the sale of the property on the 20th September 1876. Charlotte Hurst objected to the sale, claiming the property as her own. Her objection was

* Regular Appeal, No. 107 of 1876, from a decree of R. Alexander, Esq., Subordinate Judge of Dehra Dun, dated the 15th September 1876. Reported under a special order of the Honourable the Chief Justice.

disallowed on the 9th August 1876. The property was eventually sold on the 20th September 1876, and was purchased by one Charles Edward Beresford, with notice of Charlotte Hurst's claim.

In the meantime, on the 18th August 1876, Charlotte Hurst instituted the present suit against the Mussoorie Bank in the Court of the Subordinate Judge of Dehra Dun. The plaintiff claimed in her plaint the reversal of the order of the 9th August 1876, and all subsequent acts and orders made under that order, a declaration of her right to the possession of the property as full proprietor, and possession of the property in full proprietary right. She based her suit on the deed of sale dated the 14th November 1868. She alleged that being entitled under her father's will at the time of the sale to a legacy of Rs. 12,000, she had purchased the property in suit, together with an estate called Ashton Cottage, arranging with her husband that he should advance the purchase-money of these properties, and promising to pay him back such moneys when she obtained her legacy; that she had subsequently sold the legacy to one Charles Frederick Vaughan for Rs. 7,875, receiving the purchase-money by a cheque for that amount, and that she had endorsed this cheque to her husband, paying the balance due to him, Rs. 125, in cash out of money of her own. The defence to the suit was that the money paid to the vendor of Mohkampur by Joseph Hurst was his own money, and not money paid in pursuance of any such agreement as alleged by the plaintiff, and that the conveyance of the property was made to the plaintiff with the object of protecting it from Joseph Hurst's creditors, Joseph Hurst being [764] in pecuniary difficulties at the time of the purchase. The defendant further alleged that from November 1868 to July 1876 Mohkampur had been held and enjoyed by Joseph Hurst as his own property, that the plaintiff's name never appeared in any transaction connected with the management of the estate, that the patwaris of the village were ignorant of her name, and her name did not appear in any revenue record as connected with the village, that in February 1872, Joseph Hurst and the plaintiff had mortgaged the village jointly to a Mrs. Dick, styling the property as "their" property, and that in February 1875, Joseph Hurst had given evidence in a certain suit to the effect that he had purchased the property, and held it as proprietor, and that he was the proprietor of it.

It was not alleged in defence to the suit that the property had been attached and sold in the execution of a decree to which the plaintiff was a party.

The Subordinate Judge fixed as an issue, among others, was Rs. 6,000, the price paid for Mohkampur, part of the plaintiff's legacy under her father's will or not? This issue was alone considered by the Judge, and on it he dismissed the suit, holding that the money paid for the purchase of Mohkampur was Joseph Hurst's money, and that there was no connection between it and the sum of Rs. 7,875 received by the plaintiff from Vaughan and made over to her husband by the plaintiff.

The plaintiff appealed to the High Court against the decree of the Subordinate Judge, contending that the property was her own separate and absolute property, and the Court of First Instance had erred in finding that her husband was the true owner.

Messrs. Ross and Conlan for the Appellant.

Messrs. Hill and Quarry for the Respondent.

The following Judgments were delivered by the Court:—

Stuart, C.J.—This is a regular appeal from a decree of the Subordinate Judge of Dehra Dun dismissing the plaintiff's claim to property called the

estate of Mohkampur in virtue of her separate and exclusive right as a legatee under her father's will, and by which he bequeathed to her a sum of Rs. 12,000. The will was dated the 16th February 1864, and there was a codicil dated [766] the 24th February 1865. The testator, J. N. Heseltine, the plaintiff's father, died on the 8th March 1865. The nature and terms of the will had been the subject of a previous suit with respect to a mortgage directed by it to be made, in which the plaintiff's rights as a legatee came to be considered. This suit came up in regular appeal to this Court, and was heard by OLDFIELD, J., and myself, and determined by our dismissing the appeal and suit on grounds and for reasons which we fully explained in our judgments (see *ante*, p. 753).

The record in that previous suit containing the proceedings in the lower Court and this Court was put in as evidence in the present suit, and it thus appears that the facts which gave rise to the present litigation are these: On the 14th November 1868, Mrs. Hurst, the plaintiff, purchased the estate of Mohkampur from one Mary Wood, the price, as stated in the sale-deed (and correctly stated, for there can be no doubt on this point), being Rs. 6,000. This sum was not at once paid down in cash by the plaintiff, although it does not appear to be disputed that she, and she alone, was the actual vendee, the money having been found by Mr. Hurst, the plaintiff's husband, she, the plaintiff, claiming that it was on the credit of her legacy that the sale to her took place. Subsequently to this purchase, that is, on the 25th November 1869, the plaintiff purchased from a Mrs. Walsh a certain property called Ashton Cottage, the consideration being Rs. 2,000, which had apparently been raised in the same way as the previous Rs. 6,000 for the purchase of Mohkampur. The two sums amounted to Rs. 8,000, which sum Mrs. Hurst swears in her deposition she repaid to her husband, first by endorsing over to him a draft for Rs. 7,875, being the sum, as explained by the plaintiff, to have been netted for her legacy, and by cash payment from herself of Rs. 125. The Subordinate Judge appears to sneer at and discredit this last circumstance, although it is not apparent why he should do so. For myself I do not see why it should be considered an "odd circumstance" that the plaintiff, situated as she was, could not command Rs. 125 on her own account, and there is not a particle of evidence to show that it was not her own money. The poor woman had suffered in pocket sufficiently already, for she [766] tells us, and the fact plainly appears in the record of the other suit to which I have adverted, that after a good deal of negotiation she disposed of her legacy of Rs. 12,000 to Mr. Vaughan, one of the executors of her father's will, for Rs. 8,000. This, as remarked by me in the previous suit, was a very improper transaction on Mr. Vaughan's part, and it might have been set aside if she had been so minded and it had been worth her while, but no question of the validity of this transaction arises in the present case. I only now allude to the circumstance for the purpose of showing that the sum she thus obtained for the legacy was the precise amount of her purchase of Mohkampur and Ashton Cottage, and the question as to the identity of that payment, as regards its legal character as well as its amount, with her legacy, or whether the payment had been made by her husband from its own resources, or what must be taken to be such, is the first question that has to be considered. The next question is one of law, *viz.*, whether, if the money was hers and not her husband's, it could be used and dealt with by him in the way stated by the Subordinate Judge.

The Subordinate Judge correctly states that the first of these is the one important question, although very inconsistently with that he thus expresses himself in his judgment: "That he (the plaintiff's husband) got the legacy money

there is no doubt, but there is equally no doubt in my mind that he received it as any other husband would do money coming to his wife," adding, with apparent inconsistency, that "the issue drawn which need be considered is, was this Rs. 6,000, the price paid for Mohkampur, part of Mrs. Hurst's legacy under her father's will or not?" and he decides that it was the husband's money and not the plaintiff's. There is a confusion of mind and want of legal knowledge in all this on the part of the Subordinate Judge which I by no means desire to rebuke, for Mr. Alexander has done his best according to his light, although I could have wished that he had not been so dogmatical in the expression of his views. He ought to have known that Mr. Hurst could not deal with the legacy "as any other husband would do with money coming to his wife," and that he could not defeat her rights under her father's will by any transaction of his own. His judgment appears to me to be altogether besides the case, and shows that he totally misapprehended the plaintiff's position and her rights under her father's will.

[767] That the Rs. 6,000 paid for Mohkampur was her money and not her husband's is, I think, very plain. In the first place, the Subordinate Judge himself says that Mr. Hurst got hold of the legacy money, in the next place the respondents, defendants, argued their case here, as they appear to have done in the Court below, on the assumption that it was her legacy that had been used in raising the purchase-money for Mohkampur, but that by conversion into cash it had changed its character and came under the control of her husband. Such a contention was totally unfounded in law, and I only refer to it now for the purpose of pointing out that, on the defendant's own showing, the money raised and paid by Mr. Hurst was really the plaintiff's and not his. But the plaintiff herself was examined in the Court below, and her evidence is before us. The Subordinate Judge put his gloss upon it, but I feel bound to reject this as altogether uncalled for. The plaintiff's evidence is not in any way contradicted or disputed, and I see no reason whatever for disbelieving it. It will be seen that it is clearly compatible and consistent with all we know of the facts. We have seen that her father made his will in 1864 and died in 1865, and the time that elapsed between the date of the purchase of Mohkampur is amply accounted for by the litigation and negotiations which had in the meantime been going on, and which prevented the payment to her of her legacy until the time mentioned by the Subordinate Judge. She states in her deposition as follows:—"My husband paid the money for me: I was negotiating the sale of my legacy with Mr. Vaughan, the executor: Mr. Vaughan sent me a cheque for the amount, *viz.*, Rs. 7,875, on the Delhi Bank, and I endorsed the whole of it over to my husband; after this receipt I concluded the sale-negotiations for Ashton Cottage, which I had been carrying on for some time previously: the price of Ashton Cottage was Rs. 2,000: I paid Rs. 7,875 to my husband by the cheque, and Rs. 125 in cash; I sold my legacy for Rs. 8,000, and Mr. Vaughan made me go shares in the expenses, so I only got Rs. 7,875." And further on in cross-examination she says, "I bought the village (Mohkampur) in anticipation of my legacy money."

Then as respects the Mussoorie Bank's bond she says: "Mr. Hurst signed the deed shown me because the loan was to him, not because he had any right in the property." And in regard to Mrs. Dick's [768] mortgage she deposes: "The deed shown me was signed by Mr. Hurst and myself: I never read the deed in question, so I cannot tell how the words "moveable and immoveable" came into it: I did not get the loan, Mr. Hurst got the loan." The Subordinate Judge makes some unfavourable comments on this evidence, but it is, I consider, unsafe to argue as he does, against the conduct

of a wife situated, as the plaintiff was, under the influence and control of a needy husband. I believe she spoke the truth when she said she had not read this deed, and I also believe that she was totally unaware that she was transferring by it any rights of hers acquired by means of her legacy. In fact, she, could not legally have joined in any such mortgage-deed without making the usual acknowledgment required of married women before the officer appointed by law for that purpose (see Act XXXI of 1854, ss. 3, 4 \dagger and 5 \ddagger), and it is pretended that any such formality was observed on the occasion.

From all these considerations I conclude and thoroughly believe that the Rs. 6,000 paid for Mohkampur was raised on the security of, and was in fact paid out of, the plaintiff's legacy, and from no other source; and that being so the plaintiff's legal rights are not as stated by the Subordinate Judge. I have looked into the record of the previous suit, and I find it there recorded that the bequest of the legacy to the plaintiff in her father's will and codicil is expressed in these terms: "I do hereby give and bequeath to my daughter Charlotte, wife of my said son-in-law, Joseph Hurst, and mother of my said grand-children Joseph and Isabella Hurst, the sum of Rs. 12,000 absolutely for her own sole use and benefit free from the control, debts, and liabilities of her present or of any future husband with whom she may hereafter intermarry, and I direct such said sum of Rs. 12,000 to be paid to my said daughter Charlotte, on her sole and personal receipt from and out of the sum of Rs. 16,000 charged upon my Ellenborough Hotel estate." The effect of such a testamentary disposition is to give the plaintiff not only separate and exclusive use of the legacy money, but sole and absolute control over its disposal. The law on this subject is clearly stated by Mr. Joshua Williams, Q. C., in his "Principles of the law of Real Property," 7th ed., 1865, p. 207 (an able and reliable work of great authority in England, although the author is still [769] alive), as follows:—"Not only the income, but also the corpus of any property, whether real or personal, may be limited to the separate use of a married woman. Recent decisions have established that a simple gift of a real estate, either with or without the intervention of trustees, for the separate use of a married woman, is sufficient to give her in equity a power to dispose of it by deed or will without the consent or concurrence of her husband. The same rule had long been established with respect to personal estate." Property is thus sometimes settled to wives so as

* [Sec. 3:—Every married woman who, either alone or jointly with her husband, is possessed of or entitled to any estate or interest in or any power to be exercised over any lands or hereditaments, which, but for the passing of this Act, she might have disposed of or extinguished by levying a fine, or suffering a recovery, or by joining in either of such assurances, shall have power, by deed, to be acknowledged by her as hereinbefore mentioned, to dispose of, release, surrender, or extinguish any such estate, interest, or power, as fully and effectually as if she were an unmarried woman.]

A married woman, with her husband's concurrence, empowered to dispose of her estate by deed acknowledged, etc.

Provision to apply to money subject to be invested in lands.

[†] [Sec. 4:—The provisions of the last two preceding sections shall, so far as circumstances will admit, apply to money subject to be invested in lands or other hereditaments.]

‡ [Sec. 5:—No deed to be executed by a married woman under the provisions herein-before contained shall, so far as regards the interest of such married woman, be valid or effectual, unless her husband concur therein, nor unless the deed be acknowledged in manner herein-after prescribed before a Judge of one of her Majesty's Supreme Courts, or before a Judge or other covenanted officer of the East India Company exercising civil jurisdiction in the place where in such deed shall be acknowledged, or before some Commissioner appointed either specially for the occasion, or appointed as a permanent Commissioner by one of Her Majesty's said Courts to take such acknowledgments.]

to prevent even its anticipation by them. But it will be observed that there is no such clause in the will of the plaintiff's father. She did anticipate the legacy by accepting the Rs. 6,000 her husband raised for her on its security, and she was entitled to do this, nor by so anticipating did she in any way change the legal character and conditions of the legacy itself, for that, as I have said, could in no wise be defeated by any contrivance on the part of her husband or any of his creditors.

The facts and evidence to which I have adverted, and which bring me irresistibly to this conclusion, appear to me to be clear beyond any doubt, and I see no necessity for a remand.

I have only to add that, if the plaintiff's husband took his loan from the Mussoorie Bank, either in ignorance of, or with the knowledge of plaintiff's exclusive rights under her father's will, he and the Bank must settle it between themselves, but in no case can the one or the other make any claim on the plaintiff, or make use of her money, should they succeed in getting it into their hands without her own deliberate consent given in the manner required by law.

I would allow the appeal and, reversing the judgment of the Subordinate Judge, decree the plaintiff's claim. No other conclusion could satisfy not only the legal necessities but the justice of the case. The respondents must of course pay all the costs, those of the lower Court as well as the costs of this appeal.

Spankie, J.—The subject-matter of the dispute between the parties and the facts of the case are clearly set forth by the Subordinate Judge. The lower Court considered that the first issue laid down by him decided the case. That issue was, was the sum of Rs. 6,000, the [770] price paid for Mohkampur, part of Mrs. Hurst's legacy under her father's will or not? Ordinarily speaking, the Judge remarks, when we look at a transaction like the one which took place between Mr. and Mrs. Hurst, we should say that the husband had bought the estate, entered his wife's name as purchaser for reasons of his own, and that the endorsement of a cheque or draft made over to him some eighteen or nineteen months afterwards had nothing to do with the matter whatever. The lower Court comes to the conclusion that the money was Hurst's own, and had no connection with the Rs. 7,875, the proceeds of the legacy, paid over to him nineteen months after the purchase. The Subordinate Judge comes to this finding on the evidence of Mrs. Hurst which he considers contradictory and improbable. He holds also that Mr. Hurst got possession of the legacy as any other husband would do, money coming to his wife.

It is contended in appeal that mauza Mohkampur is the separate and absolute property of the appellant, Charlotte Hurst, and the Court was wrong in finding that her husband, Hurst, was the true owner. Secondly, that the purchase-money of the village in question, though paid in the first instance by appellant's husband, was eventually paid by appellant, who made over her legacy of Rs. 8,000 to her husband in satisfaction of the loan by means of which the said village had been originally purchased by her. Thirdly, that it is not shown that the legacy was paid for any other purpose. Fourthly, that the reasons by the lower Court for its decision are fallacious and erroneous, and do not support the conclusion upon which that decision is based. Fifthly, that the amount entered in the lower Court's decree as pleader's fee is improperly calculated.

The suit appears to me to have been insufficiently tried, and Charlotte Hurst's evidence to have been set aside on apparently too slight grounds. There

is no reason to doubt that she had the legacy in prospect when the purchase was made, a legacy to herself, and for her own use and benefit and quite independent of her husband's control. With this prospect before her it was not unlikely that she might contemplate the purchase of immoveable property, and it was not improbable that her husband should have found the money for her in the first instance, and have received it back from her on payment of the legacy. She stated that, when the village was bought, they were well off as compared with their present [771] position, and were then perfectly solvent. She appears to have given her evidence freely. It was not damaged in cross-examination or by the Court when the Judge examined her. She may have been flurried by the Court, but I certainly do not trace in her evidence confused and contradictory statements. These statements at least remain uncontradicted. The other party produced no evidence at all. If the lower Court thought that Charlotte Hurst's evidence was not satisfactory, she should have been allowed the opportunity of bringing forward some proof in corroboration of it. It would seem, however, that the Subordinate Judge was of opinion that the husband must needs have the control of the legacy, and that it was paid to him as any other money coming to his wife would be paid. This, in fact, was doubtless pressed upon him at the hearing, and indeed was contended here by respondent's pleader, Mr. Quarry. There is no doubt that, when from the terms of the gift, settlement or bequest, the property is expressly, or by just implication, designed to be for a woman's separate and exclusive use (for technical words are not necessary), the intention will be fully acted on, and the rights and interests of a wife sedulously protected in equity. There is no difficulty in this case as to the words used. The will of J. N. Heseltine gives the money to Charlotte Hurst "absolutely for her sole use and benefit, free from the control, debts and liabilities of her present or any future husband." The money is to be paid to her "on her sole and personal receipt." These words exclude the marital rights of a woman's husband, and the property will be regarded as being for her exclusive use.

So far then Charlotte Hurst, having certainly the exclusive control of this money left to her, might not unreasonably, as remarked above, have entertained the idea of buying Mohkampur, and as her statements remain uncontradicted there was *prima facie* no reason to doubt the truth of the claim. There are, however, alleged to be certain circumstances, such as the condition of Hurst's affairs for some time past, and the fact that he had treated Mohkampur as his own, regarding which it would have been desirable that further inquiry should have been made. Hurst himself should have been examined, and he should have been questioned regarding the alleged advance to his wife of the sum necessary to pay for Mohkampur, and also respecting the mortgage [772] of that village, amongst other properties, to Mrs. Dick. On the other hand, the defendant should have the opportunity of showing from any other evidence that he could produce, that the money used was not Mrs. Hurst's. The defendant, indeed, should have had evidence ready on this point, as it was in issue on the day fixed for trial. I do not understand why it was not produced if at hand, and if this suit were dismissed now the defendant would have himself to blame. But I would prefer, having regard to the fact that there are some suspicious circumstances in the case, that there should be further inquiry, and would remand the case to the Subordinate Judge in order that he should try and determine whether the purchase of Mohkampur was made by Charlotte Hurst on her own account and with money advanced by Hurst as a loan, which she subsequently repaid to him, or whether Hurst was the real purchaser and owner, and the money paid was his own.

The determination of this issue in a satisfactory way would, I think, dispose of the case. The remand might be under s. 354, Act VIII of 1859. On return of the finding a week might be allowed for objections, and on the expiration thereof the appeal would be disposed of.

[1 All. 772]

APPELLATE CIVIL.

The 22nd July, 1878.

PRESENT :

MR. JUSTICE TURNER, OFFICIATING CHIEF JUSTICE, AND
MR. JUSTICE PEARSON.

Beresford.....Plaintiff

versus

Charlotte Hurst and another.....Defendants.^{*}

Real property—Legacy—Husband and wife.

C, a married woman, was entitled, under her father's will to certain money "absolutely, for her sole use and benefit, free from the control, debts and liabilities of her husband," and under such will such money was payable to her "on her sole and personal receipt." While so entitled, C borrowed from her husband the purchase-money of certain real property, on the understanding that she would pay him back such money when she obtained her legacy. The conveyance of such property was made to C, but not to her separate use. C subsequently assigned her legacy by sale, and out of the money obtained by such assignment repaid her husband the purchase-money of the property purchased. C and her husband were married before [773] Act X of 1865 came into force, and had acquired an Indian domicile. Held, that, even if English law were applicable in the case, and any interest in the property purchased passed to C's husband, it passed, in view of the agreement between her and her husband, on an implied contract that he would hold the property in trust for her, and that, where such property was purchased at a sale in the execution of a decree against J as his property, with notice that such property was claimed by C as her separate property, such purchase did not defeat the title of C.

THIS suit arose out of the execution of the decree obtained by Charlotte Hurst against the Mussoorie Bank, on the 3rd May 1877, in the High Court, in the suit brought by her against the Bank, the circumstances of which are fully reported at p. 762 of this volume. The report of that case and of the case of *Vaughan v. Heseltine* reported at p. 753 of this volume should be read together with this report. Before Charlotte Hurst obtained that decree, viz., on the 20th September 1876, the property in suit was sold in the execution of the decree in the suit registered as No. 185 of 1874, which was a decree in favour of the Mussoorie Bank and against Hurst and Heseltine. It was purchased by Charles Edward Beresford, the plaintiff in the present suit. Having been dispossessed by Charlotte Hurst in the execution of her decree

* First Appeal, No. 43 of 1878, from a decree of P. Bullock, Esq., Subordinate Judge of Dehra Dun, dated the 3rd December 1877. Reported under a special order of the Hon'ble the Chief Justice.

Charles Edward Beresford eventually brought the present suit against Charlotte Hurst and Joseph Hurst for possession of Mohkampur. The plaintiff stated that he had acquired the right, title, and interest of Charlotte Hurst in Mohkampur in virtue of his auction-purchase, and that if he did not acquire any such right, title, and interest by such purchase, but acquired only the right, title, and interest in the property of Joseph Hurst, then Joseph Hurst was the sole owner of the property, and the plaintiff was entitled to it in virtue of his auction-purchase. The plaintiff alleged in support of his statement that Mohkampur belonged to Joseph Hurst as follows :—

" Mohkampur was in November 1868 the property of Mrs. Mary Wood, widow, of Dehra. Joseph Hurst heard it was for sale, and wrote to the lady's son making an offer for the same, which was accepted in writing. He afterwards delivered a cheque for the price to Mr. Wood, and asked him to make the conveyance in the name of his wife, Mrs. Charlotte Hurst. Mr. Wood agreed to make the conveyance as requested, thinking, the object of it was the protection of Mohkampur from the grasp of Mr. Hurst's creditors.

" The cheque was for Rs. 6,350, and was not against Joseph Hurst's own money, but against money borrowed from the Mussoorie Bank, Limited. At the same time he was in debt to the extent of about Rs. 30,000, without [774] any particular means of meeting his debts, and shortly afterwards he embarked in a risky timber business which involved him in additional liabilities..... The conveyance of Mohkampur was not made to Mrs. Charlotte Hurst's separate use or independent of her husband. Therefore, its operation is to vest the property in the husband, Joseph Hurst.

" If it were otherwise, the transaction would stand as a voluntary postnuptial settlement of Rs. 6,350 by Joseph Hurst upon his wife. As he was in debt at the time it was made, and actually borrowed the money at a high rate of interest for the occasion, and it is still in one form or another due to his creditors, it was a fraudulent settlement, and void under the Act 13 Eliz., c. 5, made perpetual by the Act 29 Eliz., c. 5, the property so acquired legally vesting in the settlor, Joseph Hurst, and remaining available to his creditors.

" Immediately after the purchase, Joseph Hurst, the husband, entered upon Mohkampur and took and enjoyed the assets and profits of it as sole owner, publicly asserting himself to be the sole owner of it, and as such his name has appeared for many years in the records of the Collector of the district, and he continued to fill the character of sole owner, without let or hindrance of any one, until this litigation began. On the 7th November 1872, Joseph Hurst borrowed Rs. 16,000 from Mrs. Louisa Dick of Dehra. Part of the security for this was a mortgage upon Mohkampur. As a nominal party to the conveyance of that estate Mrs. Charlotte Hurst signed the mortgage, which in effect sets out that the property is her husband's; if the property had not been in fact her husband's, then Mrs. Charlotte Hurst committed the grossest fraud upon Mrs. Dick, in aiding her husband to procure the Rs. 16,000 by virtue of a deed she knew was totally inoperative.

" On the 24th and 25th February 1875, under circumstances the most solemn in which any European claiming to be respectable could be placed, namely, under cross-examination conducted with the utmost deliberation, extending over two whole days, in a suit brought against him to recover a large sum of money, Joseph Hurst swore as follows:

" ' I have purchased landed property in India * * .'
 " ' I bought Mohkampur from Mr. C. Wood * * .'

" ' I hold Mohkampur as zamindar * *. I am zamindar of Mohkampur. I don't know the exact amount of revenue I pay; my assistant pays in the revenue, and receives the receipts; I did not ask what the revenue was when I was purchasing it; I don't remember if I made any inquiries as to the income of the village; did not inquire how much land there was in Mohkampur, but was told how much there was; I had no reason for not inquiring * *; it was not the custom for a native lessee to describe himself as zamindar.'

"As it cannot be asserted that Mr. Hurst committed perjury, or that he and his wife deliberately cheated the mortgagees of Mohkampur, or that the Collector's records are wrong, it follows that Mohkampur was Joseph Hurst's, [775] and if it was his interest alone the plaintiff succeeded to, that interest covered the whole property."

The defence to this suit rested on the allegations on which the claim in the suit by Charlotte Hurst against the Mussoorie Bank above referred to rested, and on the establishment of which the High Court had given Charlotte Hurst a decree in that suit.

The Subordinate Judge fixed the following among other issues :— "(i) Did the sale of the 20th September 1876 operate to transfer to the plaintiff the rights and interests of all the defendants in suits No. 155 of 1874, No. 56 of 1876, and No. 185 of 1874, in which attachment of Mohkampur had been made; if not, whose rights and interests passed to plaintiff by that sale? (ii) Does the High Court's decree set aside the sale made to plaintiff on the 20th September 1876? (iii) If only Joseph Hurst's interest in Mohkampur passed to plaintiff by the sale, what was his interest in the property? (iv) Is the plaintiff entitled to recover the property as a *bona fide* purchaser for valuable consideration?"

On the first issue the Judge found that Mohkampur was sold in the execution of the decree in suit No. 185 of 1874, and that the sale only operated to transfer the rights and interests of the defendants in that suit, and that consequently only the rights and interests of Joseph Hurst in Mohkampur passed to the plaintiff by the sale. On the second issue the Judge found that the sale of Mohkampur was set aside by the decree of the High Court. On the third issue the Judge found that Joseph Hurst had no interest in Mohkampur. On the fourth issue the Judge held that the plaintiff was not entitled to recover the property because he was a *bona fide* purchaser of it for valuable consideration. The Judge in accordance with the determination of these issues dismissed the plaintiff's suit.

The plaintiff appealed to the High Court. The facts of the case and the arguments are stated in the judgment of the Court.

Mr. Quarry for the Appellant.

Mr. Spankie for the Respondent.

The Court delivered the following

Judgment:—In 1876 the respondents, Mr. J. and Mrs. C. Hurst, were in pecuniary difficulties. In suit No. 155 of 1874 the [776] Mussoorie Bank, Limited, held a decree against both respondents. In suit No. 185 of 1874 the same bank held a decree against Mr. J. Hurst and his brother-in-law Mr. Heseltine, and in a third suit brought by Khushal Rai and another a decree had been passed against Mr. J. and Mrs. C. Hurst. In execution of the decree in suit No. 155 of 1874 the village Mohkampur was attached on the 31st March 1876, and an order for sale issued on the 4th April 1876, fixing the 20th May 1876, for the sale, but on the application of the respondents and on payment of Rs. 3,747-15-0, and on the execution of an agreement for the satisfaction of the balance, the sale was postponed *sine die*. Mohkampur was again attached on the 9th June 1876, in execution of the decree obtained by Khushal Rai, but no further proceedings were taken till October 6th. Finally, Mohkampur was attached on the 13th July 1876, in execution of the decree obtained by the Mussoorie Bank against J. Hurst and Heseltine, and on the 17th July an order was made for the sale of the property on the 20th September. The respondent Mrs. C. Hurst at once filed an objection, claiming

that Mohkampur, as her separate property, should be released from attachment. Her objection was disallowed on the 9th August 1876. On the 18th August 1876, the respondent Mrs. C. Hurst filed a suit claiming that her right might be declared to Mohkampur, that she might be put in possession of it, and the order of sale declared void. Her suit was dismissed by the Court of First Instance on the 15th September 1876, and on the 20th September 1876, the property was put up to sale in execution of the decree obtained by the Bank against Hurst and Heseltine as the property of J. Hurst. It was purchased by the appellant with notice of the claim asserted by Mrs. Hurst, and notwithstanding Mrs. Hurst's opposition the appellant obtained possession on the 22nd November 1876. Meanwhile Mrs. C. Hurst appealed to the High Court, and on the 3rd May 1877, obtained a decree declaring her right to Mohkampur and to possession of the estate, and at the same time the order of the 9th August 1876 was declared null and void, and all subsequent acts and orders under the said order were also declared null and void. The appellant was not made a party, nor did he apply to be made a party, to the appeal brought by Mrs. Hurst, but on the 11th July 1877, in execution of Mrs. Hurst's decree, possession of Mohkampur was delivered to her [777] and the appellant's servants were turned out of possession. The appellant instituted a possessory suit which was dismissed, and he then instituted the suit out of which the appeal arises. The Court below found that the sale of Mohkampur operated to transfer only what rights were possessed by Joseph Hurst in that estate, that the order in pursuance of which the sale was made was in fact set aside by the decree obtained by Mrs. Hurst, that Mohkampur was the sole property of Mrs. Hurst, that the appellant purchased with full knowledge of Mrs. Hurst's claim and was not on any ground entitled to be protected against it, and that Mrs. Hurst was entitled in execution of her decree to oust the appellant. The Court of First Instance consequently dismissed the suit with costs.

In appeal it is contended that Mohkampur was in fact purchased by Joseph Hurst for himself and not for his wife, and that, if it was not purchased for himself but for his wife, when it was conveyed to the wife Joseph Hurst acquired her estate by *courtesy*, which will pass to the purchaser of his right and interests, and that, if Mrs. Hurst had an equitable title to the property, she is not entitled to protection against the purchaser, inasmuch as, as the equity was so doubtful, he was not bound to take notice of it. The last objection in appeal is expressed in such general terms that it is not clear what is the particular ruling to which this plea is directed. At the hearing the pleader who appeared for the appellant advanced, though he did not seriously press, the objection that the sale was made in execution of all the decrees in which the property had been attached, but it is clear that this was not so. We have the order for attachment, and though there is no application on the file, there is the order for sale. Then there is the objection of Mrs. C. Hurst which would have been frivolous if at the time an order existed for the sale of her rights also, and then there are sale-proceedings and a certificate,—all made in the one cause in which Hurst and Heseltine were defendants, and to which Mrs. Hurst was no party.

The pleader for the appellant more strenuously urged that the property was in fact purchased by Hurst on his own account, and that the conveyance was merely taken in the name of his wife as his *isnfarzi*. On the other hand, the respondents allege that [778] Mrs. Hurst, being entitled under her father's will to a legacy of Rs. 12,000, which was to be paid to her separate use in instalments of Rs. 3,000 per annum, was desirous of investing the legacy in

land, and as it was not immediately payable, she borrowed the purchase-moneys of Mohkampur and two other properties from her husband and received conveyances in her own name, her husband consenting that the property so purchased should be held by her to her separate use. It is not denied that Joseph Nelson Heseltine by his will, dated February 16th, 1864, and a codicil, dated the 24th February 1865, devised an estate known as the Ellenborough Hotel estate to his son Robert Henry Heseltine, subject to the condition that Robert Henry Heseltine should, when requested so to do by the trustees, execute a mortgage of the estate to secure the payment of Rs. 16,000 by instalments of Rs. 3,000 per annum, without interest, the first instalment to be paid on the expiration of one year from the testator's decease, and the testator bequeathed to his daughter Mrs. C. Hurst, the respondent, the sum of Rs. 12,000 to be paid out of the instalments provided by the mortgage, commencing with the second instalment, for her sole use and benefit, free from the control of her husband then living or of any future husband. Joseph Nelson Heseltine died on March 8th, 1865, and on March 2nd, 1866, Robert Henry Heseltine executed a mortgage of the Ellenborough Hotel estate to Joseph Hurst and Charles Frederick Vaughan, to secure the sum of Rs. 16,000, with the intention of giving effect to the condition imposed on him by his father's will. There had then accrued due to Mrs. Hurst in November 1868, when the purchase was negotiated, Rs. 6,000; in March 1869, she would be entitled to a further sum of Rs. 3,000. It is said that in 1868 Hurst was in debt, and it is suggested he might have desired to place any property he might acquire beyond the reach of his creditors. It is, however, admitted he had a large cash credit with the Mussoorie Bank. He negotiated the purchase of Mohkampur without informing the seller that the purchaser was Mrs. Hurst, but when the terms of purchase had been settled, he directed the seller to convey the property to Mrs. Hurst. The sale-deed does not state that the property was conveyed to Mrs. Hurst's separate use, but in this country deeds are ordinarily prepared by persons who have little, if any, acquaintance with English law, and therefore [779] we do not attribute any weight to this circumstance. At the time of registration of the sale-deed a power-of-attorney executed by Mrs. Hurst was also registered appointing her husband manager of the estate on her behalf. Hurst paid the purchase-money, Rs. 6,350, out of his cash credit. He subsequently purchased two other properties, one for Rs. 2,000 and another for Rs. 2,500, and these also were conveyed to his wife. The total of these purchase-moneys, Rs. 10,500, would not have exceeded with interest the sum which Mrs. Hurst was to receive under her father's will, if her legacy had been duly paid. For some cause or other its payment was not pressed, possibly because Hurst and R. H. Heseltine were connected in pecuniary affairs, and in 1870 the legacy was sold with Hurst's consent to a trustee, Mr. Vaughan, for the sum of Rs. 7,875, and it is not denied that Hurst received this sum and used it as his own. It is admitted that what cattle and implements of husbandry were used in the sir cultivation of Mohkampur belonged to Hurst. Hurst was called upon to produce accounts showing the disposal of the profits of the estate; he failed to do so; and it may be assumed that the profits were used either in the ordinary course of business or in the maintenance of his household. It does not necessarily follow that the estate was not purchased on behalf of and held by Mrs. Hurst as her own; she was living with her husband, and may well have consented to allow him to cultivate her land and to receive the profits of the estate and appropriate them to the general expenditure. It has been shown that in February 1875, Hurst swore he had purchased landed property in India, that he had bought Mohkampur, and was the zamindar of Mohkampur, and paid revenue for it. If these statements

had been made when the question of the ownership of Mohkampur was in issue, of course they would have gone far to discredit any evidence now given by Hurst in support of his wife's case, but the question then raised was only as to Hurst's knowledge of zamindari matters. While, then, those statements are not to be altogether disregarded, too much weight is not to be given to them. It is also urged that Hurst obtained a loan from a Mrs. Dick on a mortgage of Mohkampur representing himself as the owner, but Mrs. Hurst was a party to the mortgage and would be bound by it. Considering the evidence as a whole, we are not satisfied that the conclusion at which the Court below [780] arrived on this issue is incorrect. It is not shown that Hurst was pressed by his creditors in 1868, nor that he apprehended difficulties, and it is shown that Mrs. Hurst was entitled to funds which would have enabled her to repay the sum advanced to her by her husband, and that in fact she did pay over to her husband the sum she received, which was in excess of the purchase-money of Mohkampur. If a scheme had been devised to conceal Hurst's ownership of Mohkampur, it is improbable that Mrs. Hurst would have made over her legacy to her husband at a time when he had, as is alleged on the part of the appellant, become more involved, and there was every probability that the money would be applied to discharge his debts, or be seized by his creditors. The conveyance to Mrs. Hurst was in our judgment *bona fide*, and executed in pursuance of the agreement alleged by her. The pleader for the appellant insists principally on the plea that the conveyance to Mrs. Hurst operated to convey the legal estate in Mohkampur to her husband, and that the conversion of the legacy operated to set it free from the separate use of Mrs. Hurst, and that her husband is entitled to the rents and profits during her life, and may obtain an estate by *courtesy* if he survives her. The parties were, we understand, born in this country; they married in this country before the Succession Act of 1865, and are domiciled here. We are not prepared to hold that the English law would regulate their interests in landed estate in this country acquired by the wife during coverture, but if it were applicable, and if any interest in the estate accrued to her husband, in view of the agreement which we have found proved, it must be held that it came to his hands upon a contract between them that he would hold it in trust for her —*Ridout v. Lewis* (1 Atk., 269); *Thrupp v. Harman* (3 M. and K., 512); *Newlands v. Paynter* (4 M. and C., 408); *Parker v. Brooke* (9 Ves., 583).

The appellant purchased with full notice of the claim set up by Mrs. Hurst, and it must be held his purchase will not defeat her title. The appeal then fails and is dismissed with costs.

Appeal dismissed.

